CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

WESTERN DISTRICT....SEPTEMBER TERM, 1828.

CORMIER & AL. vs. *RICHARD & AL.*

APPEAL from the court of the fifth district—the judge of the 7th presiding.

An attorney does not disclose professional secrets when he deposes to the plea he was directed to file in court.

MARTIN, J. delivered the opinion of the court. The petition states that L. Richard bought a tract of land from Gerard and wife, for two thousand five hundred dollars, payable in two equal instalments, in May 1823 and 1824, with the privilege of postponing payment during three years, on paying interest at the rate of ten per cent. a year; and on the same day he and the other defendants executed their joint and several notes to Gerard for

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that sum, payable by two equal instalments on the same days; and no part thereof being paid on the last day of May, 1824, Gerard brought suit against the defendants, who availed themselves of the stipulation made in the act of sale in favor of the vendees, and Gerard dismissed his suit. Afterwards, Gerard and wife transferred the notes to the present plaintiffs, who now prayed for judgment against the defendants, with legal interest from the judicial demand; and farther, against L. Richard, interest at ten per cent. on each instalment, from the time it became due, until the judicial demand, and then at five per cent.

The general issue was pleaded; but the execution of the notes was admitted. There was judgment for the plaintiff, with interest at five per cent. They appealed.

As to L. Richard, the only question is, whether the notes created a novation of the debt, resulting from the act of sale. We think they did not. The debtor was not discharged; because such discharge must be express, and is not to be implied.

The judge *a quo* has thought there was no evidence connecting the debt resulting from the notes with that resulting from the act of

sale. It is in evidence that when these three defendants were sued on their notes, they employed an attorney to resist the claim, on the ground that the amount of the notes was the consideration of the sale, and the vendee had the faculty of postponing payment during three years, on paying interest at the rate of ten per cent.

To the testimony of the witness who deposed to the fact (the attorney) there is a bill of exceptions It was objected that the attorney came to disclose professional secrets. We think the district court did not err in overruling this objection. The direction to resist the claim on the ground stated, was not a secret confided to the attorney, since he was to spread the opposition on the record.

The testimony leaves no doubt on our minds that the allegation in the petition, that the notes were given for the price of the land, is duly proved. The defendant, L. Richard, was therefore bound to pay interest at ten per cent. but as an interest at five per cent. has been allowed, he owes only an additional interest at five per cent. from the original days of payment until the judicial demand, as prayed for.

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As to the other two defendants, the judgment is according to the prayer of the petition.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be annulled, avoided, and reversed, and that the plaintiffs recover from the defendants two thousand three hundred and ninety-four dollars; a credit of one hundred and six dollars being admitted, with legal interest from the judicial demand; and further, from the defendant, L. Richards, an additional interest of five per cent. on eleven hundred and forty-four dollars, from the last day of May, 1823, and on twelve hundred dollars, from the last day of May, 1824, up to the judicial demand: the defendants paying costs in both courts.

Lesassier and *Bowen* for the plaintiffs—*Brownson* for the defendants.

MAYFIELD vs. *COMEAU.*

Three creditors are necessary to form a *concurso*, but three are not necessary to form a meeting.

APPEAL from the court of the fifth district. The judge of the 7th district presiding.

PORTER, J. delivered the opinion of the court. This is an action to recover possession

from the defendant, of a tract of land which the plaintiff purchased at the sale of an insolvent's estate.

The defendant was the insolvent whose estate was sold by auction, and in his answer he has set forth several grounds of defence to the demand contained in the petition. They principally relate to irregularities in the sale, and the proceedings previous thereto. As an insolvent debtor has no right to call in question the legality of the measures pursued by *his* creditors after his cession is accepted, and a syndic appointed; we are freed from the necessity of examining any of the objections raised, except these, which deny that the cession was accepted, or a syndic duly appointed.

We are, however, of opinion that both these objections are untenable. Three creditors may be necessary to form a *concurso*, but the presence of three is not required to form a meeting. This point has been already decided in the case of *Turcas* vs. *l'Eglise*. The proceedings of the two creditors who appeared before the notary, accepted the cession, and voted for a syndic, appear to us free from any objection, and to have been conducted according to law. 4 *n. s.* 462.

The creditor of an insolvent who is put on the *bilan*, cannot object to the regularity of the proceedings in a case where the effect of them is collaterally involved,

The sale of an insolvent' estate must be made on the same terms, and under the same formalities, as property seized in execution

It is an essential prerequisite of sales under execution, that public notice should be given of the time and place at which they are to be made,

A purchaser under a forced sale does not acquire a good title, when the formalities of law have not been pursued

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One of the creditors who was placed on the *bilan*, and who failed to appear in the judgment of *concurso*, though duly cited so to do, has intervened in this cause, and in his petition of intervention has stated various matters why the possession claimed should be refused, and the sale to the plaintiff annulled.

These matters may be resolved into the following points:

1. That the creditors were never called to deliberate on the terms of the sale, and that no notice of such meeting was ever given to the interpleader.
2. That if there was such a meeting, a sufficient number of creditors did not attend.
3. That the proceedings were not homologated before the 2d day of December, 1826, and that the property surrendered could not be disposed of previous to the homologation.
4. That the sale was illegally made for cash, when there was no special mortgage on the property.
5. That the sale was not advertised according to law.

All these objections, except that which relates to the advertisement of the property, may

be considered and disposed of together. The interpleader was put on the *bilan* of the insolvent, and duly cited. Being thus a party to the suit in *concurso*, the judgment of homologation forms *res judicata* against him, and until that judgment be reversed, on appeal or otherwise, he is concluded by all the matters embraced by it. It would be an intolerable abuse to permit the various creditors of an insolvent, after all the proceedings had been gone thro' without objection, to drop in one by one, and try them over again in suits in which the regularity of these proceedings was collaterally involved. This point was decided in this court so far back as the year 1816, in the case of *Dussau's syndics* vs. *Bedeaux.* 4 *Martin* 450

But the interpleader contends, this homologation does not cure any defects in the sale, because the judgment of the court is prospective—authorising the property ceded to be sold; whereas at the time this judgment was rendered, the land in question had already been disposed of by the syndics. The judgment of homologation is of date the 2d of December. The sale is of the 9th of October, in pursuance of an order of court of the 23d of August preceding.

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This irregularity most probably arose from inattention, at the time the judgment was drawn up, to what had been already done in the case. But as the syndic proceeded in strict conformity to law, by applying to the court for, and obtaining, an authorisation to sell the property, we are unable to see any thing which can prevent the court below confirming the sale, when the homologation of the tableau of distribution is there applied for.

It is still, however, contended, on the part of the plaintiff in intervention, that had the evidence which he offered in the court below been received, much would have been shewn to have prevented the sale receiving the sanction of the court.

The act of 1817 directs that the syndics of an insolvent's estate shall, after obtaining an order of the judge, sell the property surrendered by public auction. No length of time is prescribed, by the statute, for the sale to be advertised. But a provision in the late amendments to our code, has taken away all doubt on the subject, by directing the sale of insolvent's property to be made on the same terms, and *under the same formalities*, as property seized on execution. The act of 1826, indeed,

authorises the creditors to vary the terms and conditions, but does not confer on them the power to dispense with the formalities which the code prescribes; and if it had, as was contended, our conclusions, in this case, must be the same, for the creditors recommended the property to be sold "upon such notice of the time and place of the sale as may be required by law.' *Louis. code* 2180, *acts of* 1826, 138, § 3.

It is an essential prerequisite of sales under execution, that public notice should be given of the *time* and place at which they are to be made. The bill of intervention avers, that in the instance before us, there was not any public notice given of the time and place of making the sale, and the bill of exceptions states, that evidence to prove the allegations in the petition, was rejected by the judge. In rejecting such proof, we think he erred. It has been already more than once decided in this court, on authorities which need not be now referred to, that a purchaser under a forced sale does not acquire a good title, where the formalities prescribed by law for the alienation have not been pursued. 4 *Martin* 573, 11, *ibid* 610.

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It is therefore ordered, adjudged, and decreed, that the judgment of the district court be annulled, avoided and reversed: And it is further ordered, adjudged, and decreed, that the cause be remanded, with directions to the judge *a quo* not to reject evidence on the part of the petitioner in intervention, that the property claimed by the plaintiff had not been advertised according to law: And it is further ordered that the appellee pay the costs of this appeal.

Brownson for the plaintiff—*Simon* for the defendant.

BARBINEAU' HEIRS vs. *CASTILLE & AL.*

Creditors of a succession cannot sue the heirs, while an action in which the same matters are involved, is pending between the curator and the defendants, The curator of an estate is not a good witness where the legality of his conduct is at issue,

APPEAL from the court of the fifth district—the judge of the seventh presiding.

PORTER, J. delivered the opinion of the court. The plaintiffs, who are mortgage creditors of one Augustin Bijeau, deceased, seek by this action to make the defendants, his widow, and her son by a former marriage, responsible in their private capacity for the debts due by the estate of the deceased. The petition charges, that notwithstanding the defendants had renounced all claims to his succession,

A party who refuses to bring in testimony unless his adversary will wave the right of commenting on its effect, cannot have the cause remanded to procure that testimony, Until the curator of a succession makes a demand of the heirs of the effects belonging to it; they are not in fault in retaining them.

they had lost the benefit of their renunciation: the widow, by taking an active concern in the community; by appropriating the effects belonging thereto to her own use—by concealing part of them, and not putting them on the inventory—by keeping in her possession the land sold by the petitioners to her husband, which was mortgaged to them, and by bringing suit against the succession for a sum of money.

The grounds of action against the son, who was testamentary heir of the deceased, are nearly the same as those alleged against the mother, with the addition of his not acknowledging himself debtor of a large sum which he owed his step-father; as also his working the slaves of the estate for his use and benefit.

The answer of the defendants, after denying all the allegations in the petition, except that Bijeau signed the note on which the suit is brought, and that the defendants had renounced; proceeds to state, that Bijeau died largely indebted to them, that they renounced his succession, and that a curator had been appointed to it. That this curator had advertised property of their's for sale as belonging to the

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estate of Bijeau; that they had applied for and obtained an injunction to prevent him selling this property; and that as they were privileged creditors to a large amount, and apprehended a great sacrifice would be made of the other property of the estate in the manner it was announced for sale, they had obtained an injunction to prevent him disposing of it.

On this issue, testimony, oral and written, was taken in the court below, and the judge rendered judgment of nonsuit against the plaintiffs, being of opinion that the plaintiffs should have brought their action against the curator appointed for the vacant estate of Bijeau, and discussed the property mortgaged before they instituted this action. That in any event it could only lie against the defendants for the balance.

It is stated in the petition, that the defendants had commenced suits against the curator of the succession, for property belonging to it, to which they set up title; and that in those actions they had enjoined the sale of the remaining portion of the effects appertaining to the estate. The answer echos these facts, and avers the correctness and legality of the

suits. The records of both actions have been made a part of the evidence in this case, and it appears that they are yet pending and undecided.

One of the most serious enquiries which the case presents, is, whether the pendency of these suits does not preclude us from an examination of many of the most important matters set out in the petition, and it appears to us that they do. In every thing claimed in this action, which relates to the property contested for with the curator, both as to title, and right to enjoin the sale, we must await the decision of the suits in which these questions have been first put at issue. That the same matters form the *litis contestatio* in these actions, though presented in a different form of action, we think will appear manifest, by supposing judgment to be rendered in the suit between the curator and the defendants; and then enquiring into its effect. If it should, peradventure, be decided that the latter had a good title to those very effects, the detention of which is now charged on them as a ground for their being responsible as heirs pure and simple; and in addition to a right to this portion of the objects claimed as making a part of the suc-

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cession, that they were also in the exercise of their legal rights in inhibiting the sale of the remainder; most certainly, that judgment would be a bar to the present action in every thing, relating to the detention and use of that property.

If the averments in the petition were, therefore, confined to charging the defendants with detaining and administering the slaves and other effects claimed by the defendants, we should be of opinion that the suit ought to be dismissed.

But the allegations of the plaintiffs go further, and cover more ground, than the mere detention of the land and slaves to which the defendants set up a claim. They charge the defendants with concealing effects belonging to the deceased, and failing to put them on the inventory. They also accuse them with retaining other property of the succession in their hands contrary to law, and using it for their own benefit. The issued joined on these matters compels us to examine this branch of the case on its merits.

In the view we have taken of them, we are saved the necessity of enquiring whether the opinion of the district court rests on solid and

legal grounds, as on other reasons we are brought to the conclusion that the judgment given below must be confirmed here.

Two bills of exceptions appear on record. The first is to an opinion of the judge refusing permission to the curator of the estate to testify in the present suit. The reasons given by the judge for rejecting him, were, "that the petition charges the defendants with keeping back part of the property mentioned in the inventory, and not delivering it to the curator. They answer it was by his consent. If by *his* consent, it discharges them, and may go to charge him, for not taking it into possession." In this reasoning, and conclusion, we concur. The case does not fall within the rule which makes servants and agents witnesses *ex necessitate*. The curator had the authority and the means to have made the demand in presence of witnesses, and to have taken legal steps to inforce a delivery of the property.

The second is to the rejection of a number of witnesses who were offered to prove the possession of the effects belonging to the estate by the defendants, and of their having used them. This testimony was objected to, on

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the ground that if they did use it, they committed a trespass; but that such proof furnished no reason for charging them as heirs. Whether this position be true or not, we need not enquire; for, admitting it to be correct, the objection went to the effect of the testimony. It furnished no reason for rejecting the evidence, and the court greatly erred in sustaining such an opposition. The counsel for the defendants, after they had succeeded in excluding the testimony, offered to admit it, reserving all objections as to its effect. This reservation need not have been made, for all evidence is open to observation as to its effect, or in other words, to what it proves; and the offer was in truth the same as an unconditional consent to admit it. The plaintiffs' counsel, however, would not accede to the proposition; and why, we are totally at a loss to conceive. He certainly could not expect the opposite parties to abandon their right of commenting on the influence and effect of the proof which their adversary presented; and after a refusal of this kind, so unreasonable in itself, and so contrary to law, we cannot in justice to the opposite party remand the cause to enable the evidence to be procured.

We come the more readily to this conclusion, because the testimony of the very witnesses whose names appear on the bill of exceptions, is afterwards spread on the record.—How it came there we cannot tell; the parties differ in their explanation, and we must take it as legally there. We have perused it with attention, and far from proving a concealment of the effects of the succession, it has produced on our minds an impression of the fairness of the defendants' conduct, in disclosing to the judge every thing which they conceived belonged to the estate. There is no evidence the curator ever made a demand of them, to deliver up the effects of the succession; and until he did, they were not in fault in retaining them.

It is, therefore, ordered, adjudged, and decreed, that the judgment of the district court be affirmed with costs.

Simon for the plaintiffs—*Brownson* for the defendants.

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DEJEAN'S SYNDICS vs. *MARTIN'S HEIRS.*

The surety on a twelve months bond cannot compel the obligor to proceed against the land sold, if the obligee's wife has obtained an injunction, which he unsuccessfully attempted to have dissolved.

APPEAL from the court of the fifth district—the judge of the seventh presiding.

MARTIN, J. delivered the opinion of the court. The defendants are sued on a twelve months' bond, on which their ancestor was surety for Rees: they pleaded the plaintiffs were first to proceed against the tract of land purchased by their ancestor's principal, and specially mortgaged for the payment of the bond.

The plea was sustained, and the plaintiffs appealed.

The appellants' counsel shew that, at the trial, he introduced the record of the suit of *Dejean* vs. *Rees*, in which the land referred to was exposed to sale on a *fi. fa.* issued on the twelve-months' bond, and the sale stopped by a writ of injunction. 2. The record of a suit instituted against Rees, by his wife, in which she obtained a writ of injunction to prevent the sale of her property by some of his creditors, other than the appellants, or their insolvent, in which suit she was nonsuited. 3. The record of another suit between the same parties, in which she obtained a writ of injunction to prevent the sale of the premises, at the suit

of the insolvent, which injunction was afterwards maintained, notwithstanding the opposition of the appellants.

Brownson deposed he was employed by the appellants to procure the dissolution of the injunction obtained by the wife: that in the first suit, being also employed by another creditor, he made opposition in his name, thinking it useless to act in that of the appellant's also, as a successful issue on the opposition would inure to their benefit: in the latter suit he acted in the name of the appellants.

We think the district court erred. The property pointed out to be discussed, having been claimed by the wife, who obtained an injunction to prevent its sale, the plaintiffs were relieved from the obligation of discussing property then in litigation. *Civ. code*, 3016.

It is, therefore, ordered, adjudged, and decreed, that the judgment be annulled, avoided, and reversed, and the case remanded for further proceedings: the appellee paying costs in this court.

Lesassier and *Bowen* for the plaintiffs—*Brownson* for the defendants.

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PIERRE & AL, vs. MASSE & AL.

A party who wishes to interplead must shew that the decision of the case is to affect his rights.

It is not enough that he shews that he has claims to enforce against either of the parties.

APPEAL from the court of the fifth district—the judge of the 7th presiding.

PORTER, J. delivered the opinion of the court. The only question in this case is the right of the interpleader to intervene. The court below refused him permission to do so, and he appealed.

The suit between the plaintiffs and defendants grew out of steps taken by the latter to carry into effect a judgment they had obtained in their favour, in an action in which both parties claimed the estate of one Madelaine Masse, a f. w. c. Judgment being rendered in favour of the defendants for two thirds of the estate, they proceeded to take out a writ of possession, and were about to execute it, when the plaintiffs obtained an injunction. In this petition they state that the writ was illegally sued out; that it could not issue until a partition was made of the property which the parties held in common. They pray that it may be quashed, and that they may recover $500, the damages they have sustained in the premises.

The answer of the defendants acknowledges

the error they had committed, expresses their willingness to have a partition of the property made, for which purpose they state they are about to commence an action of partition; and avers that the plaintiffs have suffered no damage, except the costs, which the defendants state they are willing to pay.

On this issue so joined, in which we can discover nothing in dispute between the parties, except the claim for damages, the petitioner in intervention prayed liberty to interplead, on the ground that he was in fact the legal heir of Madelaine Masse, and entitled to the whole of the property left by her. His petition concluded by a prayer that both parties may be compelled to answer it; that he may be decreed to be the sole heir of Madelaine Masse, and as such entitled to the whole of her succession.

We think the court below did not err in refusing permission to interplead. The petition does not shew any interest which the intervenor had in the question of damages which was at issue between the parties. And it is not sufficient that the interpleader has claims to establish and enforce against plaintiff or defendant; to authorise an interference in their disputes, he must shew that the decision of the

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matters at issue between them, will, or may, affect his rights.

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It is, therefore, ordered, adjudged, and decreed, that the judgment of the district court be affirmed with costs.

Brownson for the interpleader—*Lesassier* and *Garland* for the defendants.

STERLING vs. *LUCKETT.*

The court may reject evidence which it deems immaterial,

APPEAL from the court of the fifth district—the judge of the seventh presiding.

PORTER, J. delivered the opinion of the court. The plaintiff claims the value of his slave, killed by a slave of the defendant. The evidence, in our opinion, fully authorises the verdict which the jury rendered in favour of the latter. There is a bill of exceptions to the refusal of the judge to permit a question to be asked of a witness, as to the looks of the defendant's slave when the plaintiff's was in a dying condition. The answer either way could not possibly have affected the case, and being immaterial, the court did not err in rejecting it.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be affirmed with costs.

Baker & Ogden for the plaintiff—*Brown-son* for the defendants.

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DELAHOUSSAYE vs, *DELAHOUSSAYE & AL*,

A privileged or mortagee creditor, is not obliged to discuss the undivided property of a succession. Third parties are not bound by the recitals in an act of sale.

APPEAL from the court of the fifth district—the judge of the 7th presiding.

MATHEWS, J. delivered the opinion of the court. The plaintiff in this case, after having obtained judgment against his tutor, for the amount or value of his property, which the latter had administered and wasted in his capacity as tutor aforesaid, commenced the present action to obtain a decree of the court below, which should authorise him to enforce his tacit mortgage against the property, now in the possession of several persons, made defendants to this suit, as having been acquired from his tutor, and on which he has a lien to secure the payment of the judgment by him obtained as aforesaid. These latter defendants appeared in court, and one of them pleaded in opposition to the plaintiff's claim on property by him held and possessed as a purchaser from the tutor, his right to require of said plaintiff to discuss the property still in the

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possession of Balthazar Delahoussaye; and also such as had been sold by the latter subsequent to the sale made to him this defendant. He pointed out, by enumeration, a variety of articles of property, to the number of nineteen, still held by the principal defendant and other persons who derived title from the latter, which, he alleged, ought, according to law, to be discussed, before that which he held could be subjected to the influence of the plaintiff's lien. The judgment of the district court ordered only three of the articles of property designated in the answer to be discussed, viz. those pointed out in nos. 1, 6 & 12; and the defendant Raymond François being dissatisfied with the decree thus rendered, appealed. The answer of the plaintiff on the appeal, admits the correctness of the judgment rendered in the court below, so far as it relates to the first and last of the numbers above cited, but complains of error in it in relation to the 6th number, according to the order in which they are placed by the answer of the defendant.

The principal questions in the cause arise out of the situation of the property designated in nos. 6, 9 & 13. That shewn by no. 6, is an undivided portion of a tract of land owned and

possessed by the defendant Balthazar Delahoussaye, in common with his co-heirs, to the successor of his father. The plaintiff relies on the last art. but one of the old code, to free him from the trouble and delay which the discussion of the property suggested by this number, would occasion. The law relied on denies to a plaintiff in execution the right of seizing an undivided portion of a succession belonging to his debtor; but authorises a judgment creditor to cause the estate to be divided, &c. To effect such division, legal proceedings would most probably be required on the part of the creditor. In cases where property is thus situated, we are of opinion that a privileged or mortgagee creditor, is not obliged to discuss it. See *Pothier, recueil de deux traités sur les hypotheques, pag.* 32.

According to this view of the question, which relates to the situation of the property designated in no. 6, we conclude that the judge *a quo* erred in decreeing that the plaintiff should be compelled to discuss it, &c.

The difficulty in which the property designated by no. 9 is involved, relative to the different rights and claims of the parties now before the court, is suggested by a bill of ex-

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ceptions to the introduction of oral testimony with regard to the manner in which it was acquired by the present proprietor and possessor. The act of sale is subsequent to that under which the appellant holds the property by him purchased from B. Delahoussaye; but the person on whom the discussion is required to operate, seeks to release himself from its effects by shewing that he received it as a *dation en paiement*, in discharge of a privileged debt which the vendor owed to a person whom the purchaser represented; and for this purpose he offered testimonial proof, which was received by the court below, and to which reception the defendant made his exception in due form. The deed purports to have been given in consequence of a sale; and the price paid proves the execution of the act. The appellant contends that the evidence of the witness offered and admitted, to shew that the contract evidenced by the written instrument was any thing else than a sale as it purports to be, was in violation of the well known rule of evidence, which prohibits oral testimony to be received in support of facts alleged contrary to the contents of contracts and agreements, reduced to writing, &c. This rule is

perhaps without exception, so far as it relates to the rights and claims of the parties themselves to the instruments in writing. But it is not so unrelenting in relation to the rights of third persons; and in this situation the plaintiff in the present case must be viewed. We are therefore of opinion that the judge *a quo* did not err in receiving the testimony offered; neither did he err in the effect which, by his final judgment, he seems to have allowed to it.

The slaves pointed out in no. 13, as objects of discussion, are nearly in the same situation as the land proposed by no. 9, just examined. They appear to have been given and received in discharge of a debt due to the vendees, from their tutor, in his capacity as such, and consequently privileged, &c.

In consequence of the error of the court below, in relation to the property designated by number 6, we are compelled to reverse the judgment of that court.

It is, therefore, ordered, adjudged, and decreed, that the judgment of the district court be avoided, reversed, and annulled: And it is further ordered, and we do hereby order, adjudge, and decree, that the plaintiff and ap-

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pellee be compelled to discuss the property designated in the plea of the appellant and defendant, by numbers 1 and 12 alone; that is to say, a tract of land of two arpents front with the ordinary depth, situated in the parish of St. Martin, on the east bank of the bayou Teche, and the mulatto man named Louis, &c. The appellant to pay the costs of this appeal.

Brownson for the plaintiff—***Simon*** for the defendant.

PONSONY vs. *DEBAILLON & AL.*

An appeal cannot be taken from a decision overruling the exception of *litis pendencia*,

APPEAL from the court of the fifth district. The judge of the 7th district presiding.

PORTER, J. delivered the opinion of the court. The defendants pleaded the exception of *litis pendencia.* The court overruled it, and they appealed.

The appeal is premature, and must be dismissed. The judgment is not final; nor the grievance irreparable; for if the decision was erroneous, the error can be corrected after the cause is tried on its merits.

It is, therefore, ordered, adjudged, and decreed, that the appeal be dismissed with costs.

Garland and *Simon* for the plaintiff—*Bowen* and *Brownson* for the defendants.

WILLIAMS vs. *BRENT.*

Plaintiff who takes a 12 months' bond and sues on it, is not estopped from denying that he took it in discharge of his debt,

The return of the sheriff that a debt is satisfied, does not conclude the creditor.

There is no difference in the effect of a sale made to a stranger, & that made to the defendant in execution.

Judgment against one debtor in *solido*, is no bar to recovery against a co-debtor.

A 12 months bond is not a payment of the debt on which execution issued

Nor does it operate a novation.

APPEAL from the court of the fifth district—the judge of the 7th presiding.

PORTER, J. delivered the opinion of the court. This action is instituted on a note by which the defendant bound himself, jointly and severally with three other persons, to pay Samuel Richardson, 2833 dollars and 33 cents.

The plaintiffs, who are the representatives of Richardson, aver that the defendant yet owes 879 dollars and 17 cents, with interest at ten per cent. from the first of February, 1815, the time the note fell due, until paid.

The defendant pleads:

1st. That although he executed the note in *solido*, he was, in truth and fact, but surety for Terrill, one of his co-obligors, and that he is entitled to every privilege sureties can claim.

2d. That a judgment was obtained by Ri-

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chardson, in his life time, against Terrill, the principal debtor, on which judgment property was seized and sold, to satisfy the debt, on twelve months credit. That, owing to the sureties not being good, and the slaves being *run off*, the judgment was not paid. But that, notwithstanding, the respondent is discharged, as the sheriff and his sureties are responsible.

The court below was of opinion, that the sale of the property on twelve months' credit was a complete satisfaction of the judgment rendered against Terril; and that the satisfaction of this judgment discharged the defendant from all liability.

The execution which issued on the judgment, was in the usual form, and the return on it is as follows: "satisfied by the sale of the "adjoining described property, at one year's "credit, for the sum of $1500."

It is shewn that Terrill was the principal debtor, and that although, as to the obligee, the respondent and his co-obligors, were bound in *solido*, yet, as between them and Terrill, they were but sureties.

It appears from the evidence appearing on the record, that the property sold by the sheriff did not belong to Terril, the defendant, but to

Brown, one of the co-obligors, by whom it was voluntarily surrendered for that purpose.

On these facts, a question of considerable importance is presented. The case has been elaborately and ably argued, and it has been intensely considered by us. The judgment we are about to pronounce is the result of our best deliberations on the subject. It would be uncandid in us, if we did not state that the conclusion to which we have come, is not free even in our own minds, from objections; but we see much less difficulty on that side of the question, than we do on the other.

Before we approach the main point in the cause, it will be proper to clear from around it every thing which prevents the real question in dispute from being nakedly and distinctly considered.

We go along with the counsel for the appellant, in a concession, which follows from the whole tenor of the argument he addressed to the court; that the act of the legislature providing for the sale of property on twelve month's credit, considered merely as an extension of time, and as a means of enforcing the obligation of the debtor, is not unconstitutional. And if we were of a different opinion,

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this case would not present that question, for the plaintiffs having accepted the bond and received part of the debt due to them from a sale made under it, have waved the objection. We also concur with him in his position, that if the act be constitutional, so far as it extends a remedy, and unconstitutional in substituting one debt for another, that their acceptance cannot be considered as an abandonment of the latter objection. They must be presumed to have taken the bond for the purposes for which they could have been legally compelled to receive it.

We also agree with him in the soundness of the proposition, that the return made by the sheriff in the suit of ***Richardson*** vs. ***Terrill***, of the judgment being satisfied, cannot enlarge or diminish the rights of the parties; because he has returned ***how*** it was satisfied; and if that which he considered a satisfaction, be not in truth a discharge of the judgment, then most certainly his conclusions cannot render it so. For that would be to make him a judicial, not a ministerial officer, and to substitute his opinions, for the commands and the wisdom of the law.

It is also true, as contended by the appel-

lants, that though the sheriff is the agent of the plaintiff, he is also the agent of the law, and that he had no choice in his selection. But it is equally true, as urged by the appellee, that the act of that officer, in taking out execution on the twelve month's bond, and seizing property under it, must be considered as the act of the plaintiff in execution; because the law has not authorised its officers to take out execution unless requested so to do, by those in whose favour judgment is rendered. The appellee, therefore, has every advantage from this act of the sheriff, that he would have had, if it had been done by the appellant.

But we cannot assent to the proposition of the appellant, that the circumstance of the property sold, having belonged to one of the co-obligors, and not to the defendant in execution, and having been bought by the owner, can make any difference in the effects of the sale. If a sale for a twelve-months' bond extinguishes the judgment and debt, then we are unable to recognise any difference between a sale to a stranger—a co-debtor in *solido*—or to the defendant in execution. The principle on which such a consequence can be deduced, rejects all arguments drawn from the

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person to whom the sale is made; and though it may be true, that on an execution the sheriff is not authorised to seize the property of a stranger, even by his consent, the acceptance of the bond in this case given by the plaintiff, waves all objection growing out of that circumstance.

It has been contended by the appellee, that the debt of Terrill on the bond merged in the judgment. This argument has been repelled by the other side, as resting on principles peculiar to the common law, and unknown to our jurisprudence. Whether a debt at common law is not considered, for certain purposes, as merging in a judgment, it is of course immaterial for us in this country to enquire. It is equally immaterial, whether the same consequence does not follow the same proceeding here by our own law. This is an action against one of several debtors bound in *solido*, or jointly and severally; and in regard to persons so bound, it is a well settled principle in our jurisprudence, that judgment against one, is no bar to recovery against another. That nothing but actual satisfaction from one of the creditors, will prevent judgment and execution against the person legally

bound with him. *R. code, lib.* 8, *tit.* 41, *l.* 28, *Poth. on ob.* 270, 271, 272. *C. code*, 278, 103, 104.

We give an entire assent to the proposition of the appellant that the bond cannot be considered as *a payment.* Although it is true, that the obligation for the payment of one thing, may be discharged or paid by another, when the parties so agree; this principle suffers an exception, when the thing so given and received, is the obligation of another *to pay*; in that case the extinction of the first obligation is produced by novation; and this brings us to the important question in this cause, whether there was not a novation of the original debt due by Terrill. If there was, it is extinguished to his creditors in *solido.* 2 *n. s.* 144, *Civil code* 296, *art.* 182.

Among the different modes prescribed by our law, by which novation is produced, is that "where a new debtor is substituted to the old one, who is discharged." The appellee contends, that the sale of the defendant's property in execution, for the price of which a bond at twelve months is taken, comes within the provision just cited. A new debtor is substituted. The law, he urges, contemplates it

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shall be a discharge, and the creditor's assent to its being so, is shewn as completely, as if it made expressly a part of his agreement that he would take a bond at twelve months, if the debtor's property would not sell at two thirds of its appraised value. The law was in force at the time of the contract, and the parties must be presumed to have contracted in relation to it. He further insists, that if this implied assent is not strong enough to charge the plaintiffs, there is still stronger evidence in the case before us—their acceptance of the bond, and their attempt to enforce it.

To this reasoning the appellants have replied: That the law did not contemplate there should be an extinction of the original obligation. It merely intended it as one of the means of satisfying the creditor. If it meant any thing more, it would be unconstitutional—*first*, in making something else than gold and silver a payment of a debt in money—*second*, in violating the obligation of a contract. That their consent was never given to any such change—neither impliedly, nor expressly: for the agreement was entered into in 1813; and the act of assembly which, it is said, produces novation, was not passed until the year 1817

The contract on which this suit was brought, was, it is true, made in the year 1813, and the act relied on became a law in the year 1817. But at the time the agreement was entered into, an act of the legislature was in force, which required property that did not bring two thirds of its appraised value, to be sold on twelve months' credit, the purchaser giving bond and security as provided by the act of 1817. The only change which this last law has introduced, is the salutary one, that instead of selling the property seized under execution, for the payment of the bond under appraisement, and at a credit, it must be sold for cash. This modification is favourable to the creditor; it enlarges, instead of restraining, his rights, and consequently deprives him of the protection which the constitution might afford, if the statute was subsequent to the contract, and impaired it.

We have then, on the constitutionality of the law presented to us, the very same point which lately exercised the learning and the wisdom of the supreme court of the United States, aided by as full and able argument as any legal question ever received since the establishment of our government. A majority of that court

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were of opinion, that a law in force at the time a contract was made, could not be considered as impairing its obligation.

We could not add to the reasoning on which that conclusion was obtained: it would be useless to repeat it. It is certainly not free from difficulty; but it appears to us freer from it, than the other interpretation. It has our assent; and we may briefly remark—that, as the prohibition in the constitution of the United States against the states passing any law impairing the obligation of a contract, is conceded to mean the *legal* obligation; it would seem to follow, the legal obligation of a contract is, whatever the law in force at the time of making it, compels the parties to do, or not to do; and that consequently it cannot be correctly said that such a law impairs the obligation of the contract. That the laws of every country, in giving the right to enforce agreements, may state to what extent they will permit them, and that *the whole legal obligation is to be sought, as well in the law which limits the right expressed on the face of the contract, as that which authorises it to be at all enforced.*

The plaintiffs, therefore, cannot, in our judg-

ment, successfully contend that the law is unconstitutional. Their ancestor knew at the time he made the agreement, that if the obligor did not comply with it, his property must be sold at twelve months' credit, if it would not bring two thirds of its appraised value. He knew, too, that law required he should accept the bond, and try to enforce it. If this law relates alone to the remedy, no question can arise as to its constitutionality. If it is to be regarded as a modification of the contract as expressed by the parties, they must be understood to have contracted in relation to such modification, and must be bound by it.

If, therefore, the statute had declared, that a bond taken in pursuance of its provisions, should discharge the judgment and the original debt, we are unable to say that such a law would be unconstitutional, in regard to any debts contracted after its passage.

But has it done so? This is the main difficulty in the cause. The statutory provisions directly applicable to the point, will be found in 2 *Martin Dig.* 164, 11; and in the act of 1817, p. 36, §15. The last directs that the sheriff shall return the manner he has executed the writ of *fieri facias*. The first contemplates'

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that satisfaction may be entered on the docket of judgment, and provides for it being done whenever it shall appear by the sheriff's return, or the acknowledgment of the creditor or his attorney, that it is discharged. In neither of these laws, nor in any other of our statutes, is it declared, that such shall be the effect of a sale at twelve months' credit, though it is true that no difference is expressly made between such a sale, and one for cash.

But does not a distinction exist in the different results produced by the sale for cash, and one on a credit, which it required no positive law to point out. When made for the first, the creditor has obtained that which he contracted for. He has, of course, obtained satisfaction, as far as it is possible the law or the debtor, could furnish it. No express declaration was therefore necessary to make it such; it is the necessary consequence of the creditor receiving that which he stipulated for. But when the thing given to the creditor is not that which he stipulated for, although the law might make it a satisfaction, *it can never be presumed*, it intended to do so. Because it is interfering without any just necessity in the contracts of individuals, and discharging

the obligation by something different from that for which the parties contracted.

These observations as to there being no necessity for any declaration on the part of the law-maker, that the receipt of the thing promised should discharge the obligation, and that such an express declaration is required where something else is given, derives great, (and if the subject were not one on which such a difference of opinion is said to exist in the profession) we would almost say unanswerable force, from the analogies furnished by the principles of our law in relation to the extinguishment of obligations by agreement between the parties. It is a well understood principle of our jurisprudence, that the discharge of an obligation is never presumed to be made in any other manner, than by the giving of that which the debtor has promised; and we have an article of our code which explicitly declares, that the obligation by which a debtor gives to his creditor another debtor, does not discharge him who was originally bound, unless the creditor *has expressly* declared that he intends to discharge him. If then an express declaration be necessary on the part of the creditor to effect novation in the

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case just put. If it cannot be presumed, does not the same principle forbid us to presume the legislature intended it? Does not every reason which forbids it being inferred, exist in the one case, as well as the other? If there be a difference, we are unable to perceive it. We have already said the law was not unconstitutional, because being in force at the time of the contract, the creditor must be presumed to have assented to it, or in other words, that the contract must receive the same construction as if the provisions of the law had been incorporated into, and made a part of it. Now suppose it had been inserted in this contract that if the debtor's property did not sell on execution, for two thirds of its appraised value, it should be sold at twelve months' credit, and that the bond of the purchaser should be delivered to the creditor, such a stipulation would not have novated the original debt, nor discharged the debtor. If it would not, the implied consent of the creditor to a law containing these stipulations, cannot have a greater effect.

We conclude, therefore, on this branch of the subject, by saying, that as the legislature have not declared that a twelve-months' bond

shall be a discharge of a debt, that the creditor, in case he is unable to make the money on the bond, may resort to his original judgment. In this particular case, the decision works no injustice and violates no equity. One of the co-sureties voluntarily presented his property to be sold for the satisfaction of a judgment rendered against his principal. This property was bought in, and then, in the language of the testimony taken on the trial, *ran it off*. No injury, therefore, has been sustained by the person whose property was sold, and the defendant's equity must depend on his. But, although this case offers no proof of loss sustained, we are aware that under the operation of the principles we have established, other contests may arise on the consequences which may follow a sale made to a stranger. Whenever they do come up for decision, unless one or other of the parties has violated the law, or neglected its provisions, the case will not present the equitable claims of the debtor alone: those of the creditor will require an equal share of attention. When the debtor shall argue: "I contracted at a time when I had reason to believe I could perform my engagement. Circumstances beyond my controul prevented

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me doing so. I did every thing in my power to repair the injury. I surrendered my property in execution. It has been sold to an amount sufficient to pay the debt. If it has failed to do so, the fault is not mine, but my creditor's, who resorted to a remedy that he knew might terminate, not in a sale for cash, but on a credit. If I am responsible for the insolvency of the purchaser, I may be made so again on the next sale, and thus the whole of my property may be wrested from me? May it not be answered, with equal truth, and greater strength on the part of the creditor: "I contracted with you in the firm belief you would comply with your engagement. On the faith of it, I have become bound myself to others. I gave you property to the full value of the money you promised to pay me; and now, because you have violated your contract, you wish to discharge it by that which yields me nothing. Thus I am to be the sufferer, without any fault of mine, excepting my confiding in your good faith. The consequences you deprecate, as to the constantly recurring sales of your property, might be obviated by either permitting a portion of it to be sold for cash, or by buying it in yourself; as you take

the benefit of an extension of credit, you ought to bear the burthen, and run the risks attendant on it." We know not how those conflicting appeals to equity might strike the minds of others, to us it appears the weight of them is decidedly with the creditor, and for this main reason—that all the misfortunes of the debtor have proceeded from his own act, and that he who is the cause of a state of things by which one or other must lose, has no reason to complain if the loss is fixed on him with whom it originated.

It has been used as an argument against the construction we have adopted, that the law has pointed out no means of enforcing the original judgment, after the sheriff has endorsed the execution satisfied by a twelve-months' bond. But this difficulty arises solely from the sheriff giving a greater effect to the sale, by his return, than it is entitled to in law. He should, in obedience to the act of 1817, when he sells for any thing but cash, state in what manner he has executed the writ, without stating what consequence follows it.

One or two minor questions remain.

The answer avers the responsibility of the sheriff for taking defective security, and that

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he should be pursued before recourse is had on the defendant. Admitting this objection to be sound, on which we do not express an opinion, there is no evidence on record that establishes the insolvency of the surety at the time he was received by the sheriff.

It has been further urged, that whatever may be the general principle, this case presents an exception, because no proof has been given that the money might not be made from the principal and surety on the twelve-months' bond; and that this property must be exhausted, before the original debtor is resorted to. This is, perhaps, true; but the answer does not plead the exception; but acknowledges their insolvency, and of course dispensed with the creditor proving it.

It is, therefore, ordered, adjudged, and decreed, that the judgment of the district court be annulled, avoided and reversed; And proceeding here to give such judgment as ought to have been given in the court below—it is ordered, adjudged and decreed, that the plaintiffs do recover of the defendant the sum of eight hundred and seventy-nine dollars and seventeen cents, with interest at ten per cent.

from 1st February, 1815, until paid; and costs in both courts.

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Brownson for the plaintiff—*Simon* for the defendant.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

WESTERN DISTRICT.. OCTOBER TERM, 1828.

DALE vs. *DOWNS*,

Western Dist. *October* 1828.

The jury may seal their verdict, and return it into court, Interest cannot be added by the court, to the verdict.

APPEAL from the court of the 7th district—the judge of the fifth presiding.

MATHEWS, J. delivered the opinion of the court. In this case the plaintiff claims from the defendant, seven hundred dollars, and interest, &c. as being due to him on a contract for work and labour in building a house for the latter. The cause was submitted to a jury who found a verdict in favour of the former for the sum of 663 dollars. On this verdict the judge *a quo* rendered judgment to the

amount of the verdict, with interest thereon at the rate of five per cent. per annum from the judicial demand; from which the defendant appealed.

The whole evidence comes up on the record, together with the judicial proceedings which took place in the court below. From these matters the appellant has attempted to deduce several errors, on which he relies, to cause a reversal of the judgment rendered by the district court. The three first of them relate to the manner in which the jury made their verdict and returned it into court. They were left under the care of a constable, and did not return their verdict until the day subsequent to that on which it was agreed on. The judge directed that it should be sealed; it appears to have been regularly received in open court. In this proceeding, we are unable to discover any error which ought to be considered fatal to the verdict thus rendered.

The fourth error assigned has reference to the judgment. It is contended that interest was improperly allowed, not being supported by the verdict. We are of opinion the judge *a quo* erred in allowing the interest of which the appellant complains. The judgment in this respect did not pursue the verdict on

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which it purports to be based, for by it no interest was given. In aid of this opinion see *vol.* 5, *p.* 448.

There are two other grounds of error suggested, which we deem wholly untenable. But the judgment of the district court must be reversed, on account of the mistake in relation to the interest allowed.

It is, therefore, ordered, adjudged, and decreed, that the judgment of the district court be avoided, reversed, and annulled: And proceeding here to give such judgment as, in our opinion, ought to have been given—it is further ordered, adjudged, and decreed, that judgment be rendered for the plaintiff and appellee, against the defendant and appellant, for the sum of six hundred and sixty-three dollars: And it is further ordered that the appellee pay the costs of this appeal; those of the lower court to be borne by the appellant,

Winn & Scott for the plaintiff—*Flint & Downs* for the defendant.

HUGHES vs. *HARRISON*.

Western Dis. October 1828.

In a sale on a *fi. fa.* the property passes by the adjudication

If there be a variance between the date of the deed annexed to the petition, and that stated in it, the former corrects the latter.

APPEAL from the court of the 7th district. The judge of the 5th district presiding.

MARTIN, J. delivered the opinion of the court. The appellant relies entirely on an assignment of errors, as follows:

1. The sheriff's conveyance to the plaintiff does not state the amount of the mortgages on the property sold.
2. The plaintiff's bid was not sufficient to cover them.
3. The deed does not recite the names of the parties to the suit, the writ, nor the style of the court issuing it.
4. There is a variance between the date of the deed stated in the petition, and that offered in evidence.
5. The deed does not state in what manner the plaintiff bound himself to pay the purchase money.

The first, third, and last assignments relate to omissions in the deed, and are of no avail, for the Code of Practice has provided that the property sold on execution passes to the last bidder by the adjudication—that the deed adds no force or effect to the adjudication;

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and that, consequently, the omissions of the sheriff in the deed do not affect the title of the bidder. *Art.* 690 *&* 694.

The record not shewing the amount of the mortgages, we are unable to say whether the bid does not cover them.

It does not appear that there is any variance between the date of the deed stated in the petition and that offered in evidence. The deed is set out in the petition, and made part of it—the error of date between the statement in the petition and the deed annexed, is not fatal, for the latter corrects the former; and it does not appear that a deed different from the copy annexed to the petition, was given in evidence.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be affirmed with costs.

Scott for the plaintiff—*Downs* for the defendant.

GREEN vs. BOUDURANT.

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If the debtor has a right to postpone payment on several notes given to the plaintiff, he cannot avail himself of an error in making payment to the assignees of these notes to prevent a recovery on one which remained in the hands of the assignor. A jury must be prayed for in time to prevent the cause being delayed a term.

APPEAL from the court of the seventh district the judge of the fifth presiding.

PORTER, J. delivered the opinion of the court. The defendant executed, in favour of the plaintiff, his three several notes, due in January, 1824, 1825, and 1826. They were given in payment of a tract of land, and a condition was annexed to them, that in case the land was overflowed, and a crop lost by high water, payment was to be postponed for one year, without interest.

There was an overflow in the years 1823 and 1826, and a partial one in 1824, which diminished the crop of that year.

This action is brought on the note which first fell due, and as a crop was made in 1825, there can be no doubt the plaintiff is entitled to recover, unless the defence of payment, set up in the answer, has been sustained.

The defendant paid the note which became due in 1825. He insists this payment was made in error, and should be imputed to the note then due, viz. that on which this suit is brought. This defence might, perhaps, avail him, if the payment had been made to the

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plaintiff; but it appears he paid his endorsers, to whom the note had been transferred for a valuable consideration. The error, therefore, is not one for which the plaintiff is responsible. He cannot be prevented from recovering what is due to him, because the defendant has paid to others what was not due to them.

There is a bill of exceptions to the judge's refusal to grant a jury. The prayer was made after the jury was discharged; and though a portion of them were then out in a criminal case, and confined because they could not agree, the judge acted correctly in refusing the application. He could not know that the jury then in deliberation, would give a verdict before the end of the term, and the trial of the cause might have been postponed.

We do not think this a case in which damages should be given for the appeal being frivolous.

It is, therefore, ordered, adjudged, and decreed, that the judgment of the district court be affirmed with costs.

Johnston for the plaintiff—*Patterson* for the defendant.

WALSH vs. *TEXADA'S SYNDIC.*

*Western Dis, October 1828,

Parol evidence cannot be admitted to contradict written.

APPEAL from the court of the 7th district—the judge of the fifth presiding.

PORTER, J. delivered the opinion of the court. The plaintiff seeks to make the estate of one Texada, deceased, responsible to him as joint purchaser of a tract of land which he acquired from M. Collins. The defendant denies any share of his intestate in the original contract, but contends the intestate bought, during his life time, the one half of the tract from the plaintiff. This difference between the parties, in relation to the manner in which the property was acquired, does not appear to arise so much from any contest between them as to the principal sum due, as from different stipulations in the contracts with regard to interest. In the deed by which the plaintiff acquired, he promised to pay at the rate of ten per cent. The sale to the deceased is silent on the subject.

The petition states the fact of the plaintiff's purchase—Texada's participation in it—his failure to comply with his engagement—and the large sum in interest and costs which the petitioner had been compelled to pay. The

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balance, after deducting two payments acknowledged to be made, is stated to be $3200.

The answer consists of a general denial.

On the trial the plaintiffs offered parol evidence to establish the partnership in the purchase of the land. The testimony, although objected to, was admitted; and in our opinion erroneously, for two obvious reasons:—*first*, because it was contradicting the written act of the plaintiff, by which, as owner of the whole tract, he sold one half to the deceased; and *second*, because it was giving parol evidence of the alienation of immoveable property.

But though the judge admitted the evidence he refused to sanction the conclusions which the plaintiff endeavored to draw from it. Judgment was given for $2100, with interest at 5 per cent.

It is unnecessary for us to examine the correctness of the opinion given below, on the evidence there admitted. Rejecting it, as we are clear we must do, the judgment was correct. The amount of the purchase money was $3000—$900 is proved to have been paid, and the property being susceptible of producing fruits, interest was correctly charged at five per cent.

It is, therefore, ordered, adjudged, and decreed, that the judgment of the court of probates be affirmed with costs.

Flint for the plaintiff—*Scott* for the defendants.

WEATHERSBY vs. *HUGHES.*

APPEAL from the court of the 7th district—the judge of the fifth presiding.

The appellant cannot assign as an error, that the judgment was signed too soon.

MARTIN, J. delivered the opinion of the court. The defendant and appellant assigns as an error apparent on the face of the record, that the judgment was pronounced and signed on the same day, and the court immediately adjourned.

By appealing, the defendant has chosen to consider the judgment as final, and it is now too late for him to pray to have his appeal dismissed, or assign as an error that the judgment was signed before the three days which were allowed him to move for a new trial had expired. Every one may waive what is introduced for his benefit alone. By signing the judgment, the district judge did not deprive the defendant from moving for a new trial.

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We held so in *Gardere* vs. *Murray*, 5 vol. 244. He might have done so at the following term, and if an execution had issued, he might have prevented proceedings on it by an injunction.

His interest might prompt him to consider the judgment as final. He did so by appealing. The appellee might then have said the appeal was premature; but the appellant cannot say so, and demand the dismissal of his own appeal. Neither can he assign as error, that the judgment was signed on the day it was given, because, by appealing, he has recognised the judgment as final, or, in other words, as signed in proper time. *See the case cited.*

It is, therefore, ordered, adjudged, and decreed, that the judgment of the district court be affirmed with costs.

Downs for the plaintiff—*Winn* for the defendant.

BROWN & AL. vs. REVES & AL.

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A buyer, while in the peaceable and undisturbed possession of the thing sold, cannot, by law, withhold the price, simply on a plea of want of title in the vendor The rights of a buyer who purchased under the old code, to suspend payment when he dreads eviction, are not governed by the provisions of the new code.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. The plaintiffs claim the amount of two promissory notes, with interest, given for the price of a tract of land, purchased by the defendant Reves, and by him sold to his co-defendants; and pray that on the failure of Reves to pay, the premises in the hands of the latter may be sold, under the mortgage in the deed of sale.

The claim was resisted, on the ground of the absence of any title to the premises in the vendors, at the time of the sale or since.—There was a claim, by way of intervention, for damages, and the value of improvements.

The district court, after a verdict for the plaintiffs, gave judgment against Reves for the amount of the notes, and interest at five per cent.; and that the premises may be sold.

From this judgment, the defendant, Reves, appealed.

It is clear the court did not err—the defendants made no legal defence. The sale took place before the promulgation of the new code, and the law was decided by this court,

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7 *Martin* 223, *vol.* 6, 523. The vendee could not refuse the claim of the vendor for the price, on the ground that he had not a title to the premises, and therefore the vendee did not acquire any—unless the latter was actually disturbed by a suit.

There is, however, a bill of exceptions to the charge of the court, who instructed the jury that

1. A buyer, while in the peaceable and undisturbed possession of the thing sold, cannot, by law, withhold the price, simply on a plea of want of title in the vendor.

2. In a suit for the price, the vendor is not bound to shew a complete chain of conveyances to him, and a better title in himself than in the whole record.

3. If the jury were of opinion, from the evidence, that the plaintiff had fraudulently sold the property of another, and the consideration of the sale had entirely failed, they might find for the defendants.

4. The vendee having accepted a conveyance of the vendor, with a warranty, could not require security, unless a suit was instituted against the former.

The first, second, and last of these propositions, are in perfect accordance with the decisions of this tribunal. *See the cases already cited.*

The third might have, perhaps, been objected to by the plaintiffs, as irrelevant, there being no allegation of fraud. Certainly it was more favourable than injurious to the defendants. But their counsel urges it was of the latter cast, being an affirmative pregnant with the negative that, unless there was fraud, the jury could not find for the defendants. Admit this, the negative proposition would be in accordance with the three of which we have expressed our approbation.

It is, therefore, ordered, adjudged, and decreed, that the judgment of the district court be affirmed with costs.

Scott and *Patterson* for the plaintiffs—*Thomas* for the defendants.

PIROT vs, *BEARD*,

APPEAL from the court of the sixth district.

Appeal dismissed, for want of a statement, &c.

PORTER, J. delivered the opinion of the court. In this case, there is neither statement

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of facts, bill of exceptions, nor any other matter by which the court can revise or examine the judgment below. It is, therefore, ordered, adjudged, and decreed, that the appeal be dismissed with costs.

Morris for the plaintiff—*Rost* for the defendant.

GREEN vs, *DAVIS & AL.*

A purchaser of the property of a succession, cannot offer in compensation a note of the testator,

APPEAL from the court of the 7th district.

MATHEWS, J. delivered the opinion of the court. This suit is founded on a promissory note, by which it appears that the defendants agreed to pay to the plaintiff, in his capacity of executor, the sum of 650 dollars.—Their answer does not deny the execution of the note, or justice of the claim made on the part of the plaintiff; but contains a plea of compensation, in support of which they allege several sums of money to be due to them from the testator and his executor. The principal item in support of the plea of compensation was rejected by the court below; and the defendants, dissatisfied with the judgment which was rendered, appealed.

The evidence and documents of the case, shew the items of set-off, or compensation, to be four in number; three of which appear to have been settled by a judgment of the court of probates for the parish of Concordia, in a proceeding which took place between the present appellee, and one of the appellants, viz. Davis. The judgment rendered by the court of probates appears to us to have been given according to the true spirit and meaning of our laws relating to the administration of inheritances. It orders a concurrent and *pro rata* payment of debts, due from the testator to various creditors who presented their claims to the court; amongst whom, Davis, one of the defendants to the present suit, seems to have appeared. This judgment, on the face of it, exhibits an adjustment and decree only in favour of one of the persons defendants to the present action; and, perhaps, on this ground alone, might have been legally rejected as evidence of compensation. But the sums claimed as set-offs, are in our opinion so clearly inadmissible, without doing violence to our system of jurisprudence established for the administration of the estates of deceased persons, that it is deemed unnecessary to de-

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cide any thing positively in relation to the discrepancy between the party defendants to this suit, and that in whose name the debt proposed as a set off, appears to stand.

According to the judgment of the court of probates above cited, the appellee could not have paid, with propriety, the whole debt due to the appellant, Davis. The latter was bound to await a just and full administration of the estate managed by the former in his capacity of executor, and receive payment from him according to a legal distribution of the funds in his possession.

To give effect to the compensation thus offered, would be contrary to the very evidence which establishes the debt due from the succession of the testator to one of the defendants; and in violation of the justice and equity inculcated by our laws on the subject of successions.

The note of the testator, dated in 1823, and transferred by endorsement to Davis, ought not to have been admitted in compensation. The present suit is brought on a promise made to the executor, in consideration of property purchased by the defendants at the sale of Dunlap's succession. If creditors of

of an estate were to be admitted to compensate in this manner debts contracted by them on account of property adjudicated under probate sales, the intention of the law to distribute the effects of the deceased among persons having just claims on his succession, according to the rank and privilege of their credits, might be entirely defeated; and the whole estate swallowed up by debts of inferior dignity, contrary to the rights of the vigilant, which, on general principles of law, should be aided, and against every fair claim of privilege and preference.

It is, therefore, ordered, adjudged, and decreed, that the judgment of the district court be avoided, reversed, and annulled; and it is further ordered, adjudged, and decreed, that the plaintiff and appellee do recover from the defendants and appellants six hundred and [illegible] dollars with interest at the rate of five per cent. per annum from the judicial demand until paid, and costs in both courts.

Johnston for the plaintiff—*Ogden* for the defendants.

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MEAD vs. *TIPPET.*

If the appellant fail to bring up the record, the appellee may do so, and claim an affirmance of the judgment and damages

APPEAL from the court of the 7th district.

MATHEWS, J. delivered the opinion of the court. This suit is brought on a promissory note made by the defendant, whereby he promised to pay to the plaintiff 1537 dollars and 76 cents. After allowing credits, the court below rendered judgment in favour of the latter for the sum of 1146 dollars and 52 cents, from which the former appealed.

The appellant failed to bring up the transcript of the proceedings which took place in the district court, on the return day ordered by the judge *a quo*; and the appellee desiring to have the judgment of the lower court affirmed, with damages for the delay occasioned by the interposition of the present frivolous appeal on the part of the plaintiff, in pursuance of the 690th article of the code of practice, obtained a copy of the record of the suit from the lower court, and brought it up.

This appeal appears to us to have been taken for delay alone, and the judgment must be affirmed with damages. It is, therefore, ordered, adjudged, and decreed, that the judgment of the district court be affirmed with ten

per cent. damages on the amount thereof, and costs in both courts. Western Dis. October 1828.

Thomas for the plaintiff.

BROULETTE vs. *LEWIS.*

Appeal from the court of the 7th district—the judge of the fifth presiding.

The appeal will be dismissed, if not taken within the time prescribed by law.

MATHEWS, J. delivered the opinion of the court. This case is before the court on a motion to dismiss the appeal. The appellee rests his application on two grounds, 1st that the appeal was improperly taken as being from the refusal of the Judge to appoint the appellant tutor to certain minor children, named in his petition; 2d, that it was not taken within the time limited by law.

As we are clearly of opinion that the appellees were supported by the last ground assumed, it is needless to examine the first. *See Law. Code, Art.* 289.

It is therefore ordered that this appeal be dismissed at the costs of the appellant.

Morris for the plaintiff—*Rost* for the defendant.

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ADAMS vs. *GAINARD*.

Under a general power, an agent cannot sell a slave.

APPEAL from the court of the 7th district, the judge of the fifth presiding.

MARTIN, J. delivered the opinion of the court. The plaintiff, as heir to his mother, claims a slave which he alledges to be part of her estate.

The defendant pleaded the general issue, and that if the slave belonged to the deceased she authorised Doughty to sell him; that he did so, and the slave by mesne conveyances became the defendant's property, and that she ratified the sale. Prescription was also pleaded.

There was a verdict for the defendant, which the plaintiff did not attempt to set aside, and judgment was given accordingly.

There is evidence that the slave was once the property of the plaintiff's ancestor, at the time of his heirship, so that the plea of the general issue is not supported.

It does not appear that Doughty had legal authority to sell the slave, but only that he was authorised generally to transact business for the defendant's ancestor. So that the defendant can only avail himself of the plea of ratification and prescription.

No express ratification is shewn, but it is contended one results from the ancestor having received from Doughty the price of the slave. The fact, however, is not otherwise proven than by receipts of the ancestor, which may or may not include the price of the slave.

As to the plea of prescription, more than five years appear to have elapsed between Doughty's sale and the inception of the present suit; but the plaintiff relies on the suspension of the plea during his minority, and his absence, and that of his mother from the state.

The minority is not otherwise proven than by the deposition of a witness, who testifies that *he thinks* the plaintiff was a minor, when he and his mother left the parish, after the sale.

The absence of the mother has been attempted to be shewn by the date of her will, which appears thereby to have been made in the state of Mississippi.

The absence of the plaintiff is attempted to be shewn by the deposition of a witness, who testifies he has seen the plaintiff at Fort Adams since the inception of the suit, about one month before the trial, and had before heard he re-

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sided in the state of Mississippi. In the pe- tion the plaintiff states he is a resident of t state of Mississippi.

On these facts, the jury having found a ver- dict for the defendant, and the plaintiff havin thought it useless to pray for a new trial, cannot deprive the latter of the benefit of the finding, on a presumption that they erred in examining the question of law, or weighing the evidence, unless such a presumption is inevitable.

That the defendant paid his money *bona fide*, cannot be denied; yet if the plaintiff shew that the sale conveyed no title, and if he claim the slave in due time, he must recover.

We have no hesitation in saying that unless a general power to act in his principal's affairs, the agent, or attorney, could not legally sell the slave, and the sale is void, until ratified.

A receipt of the price would operate such ratification, and it was the province of the jury to say whether the price was received by the owner of the slave.

Five years and four months elapsed since the date of the agent's sale—from which the prescription runs, before the service of the

...ation, so that the plea must prevail, unless ...ence or minority prevent it.

...Of the absence of the mother, no evidence ...administered, except the circumstance of ... having made her will in the State of Mis...ssippi; and the defendant urges, she might ... done so, while on a visit there.

...the absence of the plaintiff before the in...tion of the suit, there is not a tittle ...ce.

...Of his mi...ty, no other evidence is ad...ed, except the testimony of a witness who ...believes that when he and his mother quitted ...the parish of Avoyelles, he was a youth, and ...witness *thought him* under the age of ma...ity. Admitting that the witness thought ...rectly, nothing shews that the plaintiff was ...r age at the death of his mother, when his ... accrued.

...We cannot say the jury erred.

...It is, therefore, ordered, adjudged, and de...ed, that the judgment of the district court ...affirmed with costs.

Johnston and *Wilson* for the plaintiff.—
Gorton for the defendant.

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When the whole matter does not appear, the presumption is that the judge's charge was correct.

GORTON vs. *BARBIN.*

APPEAL from the court of the seventh district—the judge of the fifth presiding.

PORTER, J. delivered the opinion of the court. The plaintiff claims $5,000 damages from the defendant in consequence of the latter stating in an affidavit made before a justice of the peace, that a robbery had been committed of his property by a negro, and "that the effects stolen were kept and could be found at Mr. Lewis Gorton's, the said Lewis Gorton knowing them to be stolen."

The plaintiff's grounds of complaint are set out in a petition and amended petition. They are not perhaps stated with all the clearness of which his case is susceptible, but we think it results from the whole, that the plaintiff intended to charge, and did charge the defendant on two grounds—*first*, for having libelled and slandered him—and *second*, for a malicious prosecution.

Whether the case was put on both grounds to the jury, the record does not inform us. There was a verdict for the defendant, and the plaintiff appealed.

During the trial a bill of exceptions was ta-

on which arises the only question that has presented for our consideration.

The court charged the jury "that the affidavit contains no charge of a criminal nature; that it was not charged the plaintiff had received the stolen goods: that the affidavit only charges, that the defendant verily believes that the robbery was committed by a negro man and that the effects are kept and can be found at Mr. Lewis Gorton's—the said Gorton knowing them to be stolen. That the goods might be kept at the house of said Gorton and he be innocent. That if the warrant which issued on the affidavit contained any thing more than was set forth in the affidavit, the defendant was not responsible, but the justice."

In this opinion we concur. The affidavit did not contain a criminal accusation, and the justice of the peace acted incorrectly in issuing a warrant on it. There is no charge, the plaintiff received the effects, knowing them to be stolen, nor any that he concealed them. The allegation is nothing more than he knew the stolen goods were at his house.

But though strictly and technically considered, the affidavit did not charge the plaintiff

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with any offence punishable by the laws of his country, it cannot be denied that to ordinary understandings it conveyed an imputation which had a tendency to injure him, and the judge should have charged the jury that if they believed the expressions were used for the purpose of defaming him, the defendant was responsible. Whether he did so or not, we cannot say. The whole charge does not come up. We can only pass on what was before us. We are bound to presume in the absence of any thing to the contrary appearing, that the judge stated the law correctly to the jury, on all points of the case. The defendant before this court, has disclaimed all intention of accusing the plaintiff with criminality, or improperly having, or concealing the goods, and it was, we presume on these grounds the verdict below was rendered.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be affirmed with costs.

Scott & Gorton for the plaintiff—*Thomas* for the defendant.

HUGHES vs. *HARRISON*.

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Married women cannot, under any circumstances, become sureties for their husbands.

APPEAL from the court of the seventh district, the judge of said court presiding.

PORTER, J. delivered the opinion of the court. The appellant assigns as error of law apparent on the face of the record:—a judgment against her for the whole amount of a note executed by her jointly and severally with her husband, the consideration of said note as expressed on the face of it, "being the amount of articles furnished them, for their, and plantation use, as per account rendered."

The plaintiff contends, this error might have been corrected by evidence introduced on the trial: it was open to him to prove the whole of the note was for the benefit of the wife.

Married women cannot under any circumstances become sureties for their husbands. It is alleged in the petition that part of the consideration of the obligation, was a debt of the husbands, for so we understand the expression, *for their and plantation use.* No evidence could have been legally received to contradict this allegation of the plaintiff's. The apparent error therefore could not have been corrected by proof.

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The case must be remanded in order that it may be ascertained what part of the consideration of the note was received by the wife.

At the close of the argument an objection was raised that there was nothing appearing on record which established the appellant, to be married to the person with whom she signed the note—all the papers in the case are entitled "Harrison and wife." The citation is directed to Mrs. Harrison. The plaintiff in his petition states her to have signed the note with the consent and approbation of Benjamin Harrison. From all these facts and circumstances, we cannot resist the conviction, that she is the wife of her co-obligor, and we yield our assent to this impression the more readily, because as we remand the case, an error on that side will only delay the plaintiff; a mistake on the other would forever deprive the appellant of the protection the law affords her.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that the case be remanded to the district court to be

proceeded in according to law. The appellee paying the costs of this appeal.

Scott & Winn for the plaintiff—*Downs & Flint* for the defendant.

SPRIGG vs. *CUNY'S HEIRS.*

Repossession of a note once specially transferred by the endorser, is not evidence of title; but it is if the transfer was in blank.

The holder of a negotiable note, by blank endorsement, may maintain suit on it, without filling up the same to himself.

APPEAL from the court of the 6th district.

MATHEWS, J. delivered the opinion of the court. This suit is brought on two negotiable notes, the amount of which the plaintiff claims from the defendants, as representatives of the first endorser, who is dead. He obtained judgment against them in the court below, from which they appealed.

The pleadings and evidence of the cause shew that the notes in question had been regularly endorsed, in full from the payee down to the present claimant, who endorsed them in blank, which endorsement was never filled up to any person. They passed into other hands, under the blank endorsement, who caused them to be protested for non-payment, and notice to be given to the endorsers. No re-transfer from the last holder to the present plaintiff, appears to have been made in wri-

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ting; but after he had obtained possession of the notes, he filled up his own blank endorsement to himself.

This act, as it appears to us, cannot better the situation of the appellee. He could by it create no more title in himself, than that which he had by the re-delivery of the notes, and possession acquired under it, as a *bona fide* holder. According to several decisions of this court, the drawer of a bill of exchange, accepted in favour of the payee and endorsee of a note of hand, when the endorsement has been filled up to the endorsee, cannot maintain actions on such instruments without proving a re-transfer of the title and interest thus transferred and acquired by the latter. In those cases, the mere possession of the bill or note, unaided by any proof of the extinguishment of the rights acquired by the holders or the transferors, was considered not even as *prima facie* evidence of title in the latter. *See* 1 *N. S. p.* 301 *&* 273.

It has been also decided by this court, that the holder of a negotiable note, under a blank endorsement, may maintain a suit without filling up the same to himself. He is considered as having obtained a full and

complete title to the instrument by delivery, when supported on regular endorsements. And it is immaterial through how many hands it may have passed in pursuance of this simple mode of transfer.

According to these decisions, the plaintiff must fail in the present action, unless a just and reasonable distinction can be drawn between the situation of an endorser in blank, and one who has made a full and complete transfer, expressed in writing. This distinction, we are of opinion, may be fairly made when a note is handed over from one holder to another. Under a blank endorsement, possession *alone* is evidence of title, at least *prima facie*. If it should return in the same manner to the last endorser in blank (whose endorsement, it is true, has transferred his right to all and every person who may become a holder, and remains transferable, by simple delivery, to all the world) what reason can be adduced to prove that the last endorser may not, in this manner, be revested with his original rights? Until the re-delivery, he had no title, because that was transferred by his endorsement. But this being in blank, the signature of no other person was necessary to

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keep the paper in circulation; whereas, when an endorsement is full and perfect, the signature of the endorser is absolutely necessary to transfer right and title to any other person; and would be necessary in a re-transfer to the endorsee, or proof of payment under protest, but ought not to be required in cases of blank endorsement.

It is, therefore, ordered, adjudged, and decreed, that the judgment of the district court be affirmed with costs.

Thomas for the plaintiff—*Johnston* for the defendant.

FULTON'S HEIRS vs. *WELSH & AL.*

A judgment without reasons, is voidable, not void.

APPEAL from the court of the sixth district.

MATHEWS, J. delivered the opinion of the court. In this case the plaintiffs claim title to a certain tract of land described in the petition. The defendants pleaded as *res judicata*, a judgment obtained against the ancestor of the former, by Collins, who was cited in warranty. This plea was supported by the court below, and judgment rendered in favor

defendants, from which the plaintiff's
ded.

judgment is objected to, as being based
absolutely void, on account of not hav-
en supported by reasons adduced by
, *who rendered it.*

appellate court has already settled the
on relating to judgments thus situated, by
ining that they are subjected to relative
only; in other words, that they are not
ately null and void, but can only be avoid-
and annulled for cause shewn on an ap-
, or in some other legal way. The judg-
ent which was pleaded as *res judicata*, re-
unassailed by any legal proceedings,
in full force, and was properly recog-
as such by the court below.

is therefore ordered, adjudged and de-
, that the judgment of the district court
firmed with costs.

omas for the plaintiff—*Baldwin* for the
dant.

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DEAN vs. *CARNAHAN*.

A copy cannot be given in evidence, when the opposite party has produced the original under notice.

A payment made under the provisions of the old code, to the holder of the obligation, is valid, altho' the possessor be afterwards evicted of it.

All laws except those in relation to remedies, are presumed to be made for cases which are subsequent to them.

APPEAL from the court of the 6th district, the judge of the 5th district presiding.

PORTER, J. delivered the opinion of the court. A twelve months' bond was taken by the sheriff of Natchitoches in virtue of an execution issuing out of the district court of the Parish of Rapides. The sheriff returned the bond into office of the parish for which he was appointed, and the obligor finding the bond in the hands of the clerk, paid it to him. The main question in the case is the validity of this payment.

But before that question can be examined, one arising on a bill of exceptions must be disposed of. The plaintiff offered in evidence a copy of the bond; its introduction was opposed by the defendant, and the court rejected it. We think this decision correct, because the defendant had already produced the original, under a notice from the plaintiff to do so. The copy was therefore secondary and inferior evidence.

We also concur with the judge below on the merits. If the case were to be decided by the amendments lately introduced to our code

conclusion he came to, would be errone- But the bond was given at the time the ...ode was in force, and by the 140th arti- ...f the 5th chapter of that work, page 288, ... provided that payment made *bona fide* to ... who is in possession of the maker of the ...edit is valid, although the possessor be after- ...wards evicted.

...he agument at the bar turned principally ...the question, which of the laws already al- ...ded to, should govern the case. The bond ...as given under the old law—the payment ...ade under the new. Perhaps an act of the ...egislature, such as this, could not be consider- ...d unconstitutional, if it were expressly made ...contracts entered into before its passage, ...if it resulted clearly from the whole context ...the law maker intended to apply it to pre- ...agreements. But it is a sound rule of ...truction to consider all laws, except those ...hich relate to remedies, as applicable only ...contracts entered into after their enactment ...have applied that doctrine to several cases ...hich can not on principle, be distinguished ...om this, more particularly that of *Miller* vs *Reynolds, & al. vol.* 5, 665—*vol.* 3, 17, 6, ...d 586.

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It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Johnston for the plaintiff—*Thomas* for the defendant.

DEBLIEUX vs. *CASE.*

There cannot be a variance between the instrument sued on and that given in evidence, when it is made a part of the petition.

APPEAL from the court of the 6th district—the judge of said district presiding.

PORTER, J. delivered the opinion of the court. The plaintiff was nonsuited in the court below, and he appealed. An examination of the case induces us to believe the judge erred. We can discover no variance between the note set out in the petition, and that read in evidence. Indeed we do not see how such a question could have arisen, for the note itself "was annexed to, and made a part of the petition."

But, on looking into the record, to see what judgment we ought to pronounce, we find the case so placed before us, that the merits cannot be enquired into. An important document, viz. the decree of separation between the de-

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dant and her husband, is wanting. Two ago, the appellant applied for and ob- ed a *certiorari*, to supply the dimunition the record. The return to it shews the ument just spoken of, to have been read evidence, but does not annex it.

It is, therefore, ordered, adjudged, and decreed, that the appeal be dismissed with costs.

Debleux for the plaintiff—*Rost* for the defendant.

TOTEN vs. *CASE*.

A sale by a legatee, who holds under a will giving the whole of the estate, while there exists a *forced heir*, is not void, but voidable.

APPEAL from the court of the sixth district the judge of the seventh presiding.

MARTIN, J. delivered the opinion of the court. The plaintiff, as forced heir of her grandmother, claims certain slaves in the possession of the defendant. The general issue, a release, and prescription, were pleaded.

There was judgment for the defendant, and the plaintiff appealed.

It is admitted that the defendant is in possession of the slaves since the first of February, 1803, and the plaintiff became a wi-

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dow in 1808. The present suit was instituted on the 19th of December, 1825, so that the defendant has possessed during upwards of twenty-two years; and if, as contended, she cannot avail herself of her possession during the plaintiff's coverture, she has possessed during seventeen years since the widowhood.

A claim of slaves is prescribed by the lapse of fifteen years, even where the possession is in bad faith. *Civil code*, 486, *art.* 66. *Id.* *art.* 74.

But it is said the defendant possesses under the will of a person who had no right to transfer the whole property in said negroes from her forced heir, the plaintiff; and consequently the defendant, holds as a co-tenant with the plaintiff, and cannot prescribe.

The donation *causa mortis* of the whole estate of a person who is forced heir, is not void; the donation is good, but reducible. *C.* 214, *art.* 26; and this reduction can only be claimed by the forced heir, *art.* 28—so the legatee's possession is in her own right.

It is, therefore, ordered, adjudged, and decreed, that the judgment of the district court be affirmed with costs.

Deblieux for the plaintiff—*Morris* for the defendant.

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CHAIN vs. *KELSO.*

APPEAL from the court of the sixth district the judge of the 5th district presiding.

The letters of third persons are not evidence. Interest cannot be given on a verdict, where the jury have not found any.

PORTER, J. delivered the opinion of the court. This is an action for work and labour. There have been two trials in the court below, and two verdicts in favour of the plaintiff.

The only question of law in the case, is presented by a bill of exceptions.

The defence rests on the non compliance, by the plaintiff's assignor, of certain conditions alleged to make a part of the contract. He repels this, by asserting a failure of the defendant to furnish, as he had promised, articles necessary to enable these conditions to be complied with. On the trial, the defendant, to establish the performance on his part of the stipulations he had entered into, offered in evidence letters addressed to him by third persons, and a letter written by him to them. The court rejected this opinion, and in our opinion correctly, as it was not the best of which the case was susceptible.

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On the merits, we discover nothing which would authorise us to interfere with the conclusion to which two juries have come, but the judgment must be reversed, as giving interest on a verdict which does not find any to be due.

It is, therefore, ordered, adjudged, and decreed, that the judgment of the district court be annulled, avoided, and reversed: And proceeding to give such judgment here as ought to have been given in the court below, it is ordered and decreed that the plaintiff do recover of the defendant the sum of one hundred and fifty dollars, with costs in the court of the first instance; those of appeal to be borne by the appellee.

Winn for the plaintiff—*Thomas* for the defendant.

MEAD vs. *OAKLEY.*

An answer praying for damages cannot be filed the day the cause is set for argument. The plaintiff must pay costs, if no amicable demand is proved.

APPEAL from the court of the sixth district —the judge of the 7th presiding.

MARTIN, J. delivered the opinion of the court. In this case the appellee did not file

answer until on the day the cause was ...ed, and the appellant urged that it could ...e received, as it prays for *damages*. We think it cannot: the code of practice, ..., has an express provision to that effect. The only question the case presents, is one ...of costs—they were given below, although ...icable demand was not proved: the defen... having expressly denied any was made. The plaintiff and appellee relies on the code ...ractice, 549. In every case the costs shall ...aid by the party, except in case of com... ...ation or real tender.

The court law of 1813 § 31, requires an ...icable demand, *verbally, or in writing*, be... the institution of suit, and declares that with... it, the plaintiff shall pay costs. This section ...t be said to be repealed by the 549th ar... of the code of practice, if the 169th arti... had not provided that it is not necessary ...ious to bringing a suit, to make an amica... demand in writing. This is a negative, ...ant with the affirmative, that the ver... one is still so, and the provision of the act ... 1813 is not repealed.

The district judge erred in giving costs to ... plaintiff.

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It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and that there be judgment for the plaintiff, for one hundred and ninety dollars, with interest at [illegible] per cent, from the sixth day of September 1825, until paid.

Flint for the plaintiff—*Oakley* for the defendant.

MILLER vs. *RUSSELL.*

Where a witness is sick, and cannot be brought into court, his evidence taken down on a former trial in the cause, may be read in evidence.

APPEAL from the court of the 6th district, the judge of said court presiding.

MATHEWS, J. delivered the opinion of the court. This suit is brought on an obligation contracted in the state of Alabama, by the defendant, Russel, and one Griswold, whereby they acknowledge to have received from the plaintiff thirteen hundred dollars, in consideration of a suretyship, into which they had entered on two bonds, in the state aforesaid, executed in order to carry up certain causes by writs of error, from an inferior to a superior tribunal, in which judgments had been rendered against Miller, the present plaintiff, for

dollars principal, besides the costs in fa- of Sneeds. The sum thus received by the ...gors, they bound themselves to pay in dis- ...rge of any judgments which might be ...ered on the appeals against the obligee. ...dgment in this case was rendered against ...e defendant in the court below, from which ...ppealed.

The evidence of the case shews, that the ...llee in the present suit failed on his ap- ... taken from the judgment which Sneed ...d obtained against him in Alabama; and ...neither the present defendant, or his co- ...ligor, has paid, or in any manner satisfied ... amount thereof. There was evidence of- ...d on the trial of the cause in the court ..., to establish the rate of legal interest in ...te of Alabama, and also the liability in ... of the signers to the bond which is the ... of the present action. The testimony of ... Whorter proves these facts; but to it ... is a bill of exceptions, as having been ...roperly admitted.

The witness had been examined in open ..., on a former trial of this case, and his ...dence was taken down in writing, which ... plaintiff was permitted to read on the last

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trial; because the witness could not be then brought into court on account of sickness. We are of opinion that the judge *a quo* did not err in receiving the testimony thus offered. It had been reduced to writing in the presence of both parties, and under circumstances where the witness might have been cross-examined by the defendant. It is true that he ought to have been again produced in open court, if it had been practicable. To have examined him, labouring under disease, and taken down his testimony, would have afforded no better evidence (perhaps not so clear) as that which had been obtained from him on the former trial. *See Starkie Ev. part 2, p.* 261.

It is, therefore, ordered, adjudged, and decreed, that the judgment of the district court be affirmed with costs.

Thomas for the plaintiff—*Oakley* for the defendant.

FISKE vs. BYNUM.

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It is not necessary for a defendant to swear that the answer of the plaintiff to his interrogatories is *material*, if he swear they will assist him in his defence.

APPEAL from the court of the 6th district, the judge of said court presiding.

MARTIN, J. delivered the opinion of the court. This case is before us on a bill of exceptions to the opinion of the district judge, in overruling the motion of the defendant and appellant for an order to the plaintiff to answer the interrogatories put by the defendant, on the ground of their being impertinent, and their materiality not being sworn to.

We think that the interrogatories were not impertinent, except part of the third in which the plaintiff was asked to answer whether he did not make a compromise with John Parkins, whom he had summoned as a garnishee, as a debtor of the defendant, and after judgment, take his note or promise to pay on a subsequent day. The other questions requiring answers to facts, of which, if they exist, there is evidence on record.

We think the defence might be assisted by proof of the plaintiff having made the compromise, and received the garnishee's note.

The law requires the defendant to swear that the answers to his interrogatories are ma-

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PIKE vs. BYNUM.

terial, and will assist him in making his defence—the defendant swears the answers he sought to obtain, would assist him in his defence, but did not add they were material.

We think the court erred in refusing the order to answer the part of the interrogatories cited, on the ground of its materiality and not being sworn to. They could not assist in the defence, if they were immaterial; and if they could assist in the defence, they were material. The variance between the affidavit required and that made, is so trifling that it ought to have been disregarded: *de minimus non curat lex.* The substance of the act is complied with, and the words are of no consequence.

It is, therefore, ordered, adjudged, and decreed, that the judgment of the district court be annulled, avoided, and reversed; and the case remanded, with directions to the district judge to proceed therein, and order the plaintiff to answer the part of the defendant's interrogatories cited: And it is ordered that the appellee pay costs in this court.

Thomas for the plaintiff—*Oakley* for the defendant.

MURRAY vs. BACON.

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Under a promise to save the vendee harmless from a mortgage, judgment against the principal debtor will not enable the purchaser to resist payment of the price.

APPEAL from the court of the 6th district—the judge of the parish of Rapides presiding.

PORTER, J. delivered the opinion of the court. The appellee has moved to dismiss the appeal, on an allegation of irregularities in the manner of bringing it up. This motion comes too late. The code of practice excludes all other answers, except those which pray for a confirmation of a judgment, if not put in within three days after the record is filed in this court.

On the merits the case presents the following facts. The plaintiff sold to the husband of the defendant, in his life time, a house and lot, for the sum of $12,000, payable in three instalments. At the sale of this property by the sheriff, he bought it in for $7,000. Sued by him for the price, he pleaded in compensation, a promissory note of $400 due to him with interest, and judgment, was rendered against him for $7601, conditioned, however, that execution should not issue, unless the plaintiff give him security to save him harmless from a mortgage in favor of Ferguson and Rich.

The mortgage in favor of Ferguson and

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Rich, was created by a note due on the second instalment, for the house sold by the plaintiff, which note he had transferred to these persons. The petition states, the property purchased by him at the sale already mentioned, was not secured to him, as by the terms of the decree, it should have been, but that he had been divested of it by a sale on an execution issuing in virtue of a judgment rendered in favor of Ferguson and Rich.

Admitting that on this eviction, the plaintiff was discharged from the judgment against him, and that a right vested in him, to set off the note pleaded in compensation in the suit. We are clearly of opinion that such right could only arise on the facts stated in the petition, namely: eviction of the premises sold to him. Now the record contains no proof of this fact. We have, it is true, in evidence, the record of Ferguson and Rich, vs. Bacon, shewing judgment to have been obtained against the defendant, but there is no evidence which establishes it was satisfied by the sale of the premises purchased in by the petitioner.

It is therefore ordered, adjudged and decreed, that the judgment of the district court

be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that there be judgment against the plaintiff as in case of non-suit, with costs in both courts.

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MURRAY vs. BACON.

Scott for the plaintiff—*Wilson* for the defendant.

CRANE vs. *BAILLIO.*

APPEAL from the court of the sixth district, the judge of the fifth presiding.

The right of the assignee must be established by matter of record, before he claim a writ of seizure & sale.

A partner cannot offer a partnership debt, in compensation of a debt of his, in his individual capacity.

MARTIN, J. delivered the opinion of the court. The petitioner, as third possessor, obtained an injunction to prevent the execution of a writ of seizure and sale obtained by Baillio, as syndic of the creditors of the estate of J. H. Gordon, on a mortgage given by the petitioner's vendor to secure the payment of two notes due to Maria C. Wilson, for her benefit and that of her minor children—on the affidavit of Baillio that the notes were given for a debt of Gordon's estate, at the time it was administered by Mrs. Wilson, were surrendered by her to the court of probates and came to his possession as syndic of the estate.

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The injunction was dissolved and the petitioner appealed.

His counsel urges that the injunction issued improperly, as none of the facts to be established by the applicant, except the creation of the debt and mortgage, were established by authentic acts; but merely by the affidavit of the applicant. He relies on 10 *Martin*, 222 *Wray* vs. *Henry*.

We held in this case that a writ of seizure and sale could not be obtained by an endorsee, who did not establish his right by an authentic act; it is not necessary that the applicant for a writ of seizure and sale should produce an authentic act, by which the debtor became bound to him—it is sufficient, after having produced the authentic act by which the debtor is bound, that he should show he has succeeded to the rights of the creditor; but this he must do by legal proof, and one's own oath is no legal proof, except in cases, in which the law for particular purposes made it receivable.—*El que pide execucion ha de legitimar su persona. Cur. Phil. Executante* 12, *El heredero ha de legitimar su persona en principio de la litis, o en lo menos, en el termino de la oppocicion, id. n.* 6.

The reason of this difference, as to the heir, is that his heirship is often, without any fault on his part, not susceptible of proof by authentic act, as when, being of full age and only heir, he succeeds to his ancestor; while he, who succeeds to the rights of the creditors by contract, has always in his power to produce authentic evidence of the transfer.

Having held, in the case from 10 *Martin*, that the endorser of a note, the payment of which is secured by mortgage, cannot establish the endorsement, at the judge's chambers, by *witnesses* and consequently by his own oath; it follows that Baillio could not establish his right under Mrs. Wilson, by his own affidavit.

But, in the present case the evidence spread on the record in the district court establishes by authentic documents that Baillio is the syndic of the creditors of the estate; that the notes were received by Mrs. Wilson while she administered the estate; that she surrendered them into the court of probates in the settlement of her accounts, as evidence of uncollected debts due to the estate. On this evidence at chambers, a writ of seizure and sale ought to have issued, and if the district court

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had made the injunction perpetual, the creditor might have instantly prayed for a new writ of seizure and sale; this justified the district court in dissolving the injunction.

An injunction, which has issued unadvisedly, will not be dissolved, if it appears from the evidence that the party will be instantly entitled to a new one. *Bushnell* vs. *Broom's heirs, vol.* 4, 499. *Exercios* vs. *Weyss*, vol. 3, 480.

The petitioner has offered in compensation a debt due by the estate to the firm of Kay & Shiff, of which his vendor, the maker of the note, is a member; this was properly rejected as a partner cannot apply a debt due to the partnership in compensation of what he owes in his individual capacity.

The petitioner had a right to complain of the issuing of the writ of seizure and sale, before due proof was exhibited of all material facts; he had a right to suspend the execution of it, and cannot be mulcted with costs for having done so.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that

the injunction be dissolved, the defendant and appellee paying costs in both courts.

Rigg & Winn for the plaintiff—*Flint* for the defendant.

CASSON vs, *LOUISIANA STATE BANK.*
LOUISIANA STATE BANK vs. *CASSON.*

If an absolute sale be made to a surety, for his indemnification, the legal title is in him, 'till he be relieved from the suretyship.
A court cannot, by anticipation, act o questions of law.
He who has a superior privilege, cannot prevent a sale, but must exercise his priviledge on the proceeds.

APPEAL from the court of the sixth district—the judge of said court presiding.

PORTER, J. delivered the opinion of the court. In both these actions the plaintiffs have been seeking to enforce mortgage claims against the estate of John Casson deceased, on property in the possession of third persons, and each has obtained an injunction against the proceedings of the other.

Before enquiring into the regularity and legality of the action thus instituted, and the respective right of the parties in reference to each other, it becomes necessary to examine and decide whether the property which they attempted to seize and sell, did not actually form a portion of the estate of Casson.

Sprigg and Scott were endorsers on certain notes held by the Louisiana State Bank. To secure them against the effects of these en-

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CASSON *vs.* LOUIS. ST. BANK.

dorsements, he made them an absolute conveyance of a tract of land owned by him in the parish of Rapides, and they on their part, executed in his favor, a certain letter, in which they state, that "the conveyance so made to them, was for the sole purpose of securing the said Sprigg and Scott against endorsements—and that whenever the said Casson shall pay and release them from such endorsements, without their having recourse to the said conveyed property, then they would re-convey the same to him for his own use." It is proved in evidence that the vendors are yet responsible on endorsements to the amount of $1000.

On these facts, we are of opinion, that the legal title is vested in Scott and Sprigg, and that the land so conveyed cannot be considered as making a part of the estate. Taking the act of sale, and the counter letter together, we have in truth presented to us the contract known to in law as the *vente a remeré*. The condition annexed to the conveyance is dissolving, not suspensive. If Scott and Sprigg are not paid or released from their indorsements, the land is theirs, and until that event takes place, it is of course no part of the estate of Casson.

These cases have been consolidated in the court below, but we find nothing on an examination of the record which presents any matter for our decision. The bank attempted to enforce their lien by an order of seizure and sale. The widow did not approve this proceeding, but prayed that the proceeds of the sale might be enjoined in the hands of the sheriff, until her right of preference could be settled. Previous to the service of the injunction on the bank, they directed a stay of proceedings, and no sale has since taken place of the premises. There is consequently no matter presented, on which an issue could be joined. The *contestatio litis* can only arise on the moneys coming into the hands of the sheriff, under a sale made at the demand of the bank, and without it there is nothing for this court to try.

It is true the bank has put in an answer to this petition, in which they deny the widow's right to interfere: the justice and legality of her claims, &c. But they had no right to do this, until the event occurred upon which her claim and theirs would come in contact. Certainly parties cannot call upon the court to try by anticipation, questions of law which

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may arise on events, that may or may not take place hereafter. Were we now to decide the point presented by this answer, we might be settling matters which may never be contested between the parties, for *non constat* that the defendant in injunction will ever execute the order of seizure and sale, or that the moneys in which the plaintiff claims a preference will ever come into the hands of the sheriff.

Dismissing therefore from our consideration all the matters growing out of the injunction obtained by the widow against the bank, we proceed to examine that, in which the relative position of the parties was changed, the bank becoming the petitioners in injunction, and the widow defendant.

In their petition they state the fact of the defendant having taken out an execution on a judgment obtained against her husband in his life time. They complain of the irregularity and illegality of doing so, without reviving it against the estate. They assert that there is other property to which she should resort before selling this, and they pray that further proceedings on her part be enjoined.

To this petition the defendant, among many

...answered, that the plaintiff has ... to interfere—that their lien if superi... hers, was on the proceeds, but furnished ... authority to stay her execution.

... this position we fully concur. The point ... lutely decided in this court. The ... requires that property exposed to sale by ..., shall be sold subject to *all* the pri... and mortgages with which it is bur... The right of the plaintiffs could not ... be impaired by the sale. Admitting ... be of a higher nature than the de... has still a right to have the pro... d, for it may bring more than will pay ... debt, and her claim to the overplus is un... ted. *See vol.* 6, 615, *code of pract.* 679,

... therefore we think the court below erred ... king the injunction perpetual against the ...dant Casson. It should have been dis... d. And to that granted in her favour as ... not affect the bank until a sale takes ... at their instance, and the proceeds come ... the officers hands, no judgment can be ... ounced upon it.

... is therefore ordered, adjudged, and de...

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creed, that the judgment of the district ... be annulled, avoided and reversed, ... further ordered, adjudged and decreed ... the injunction granted at the suit of ... isiana State Bank vs. Casson, be dis... bank paying costs in both cases.

Thomas for the plaintiff—*Scott &* ... for the defendants.

NOBLE vs. MARTIN & AL.

It is a good ground for the dismissal of an overseer, that he uses grossly abusive language to his employer.

If the deputy sheriff be absent from court on official duty, his testimony taken down on a former trial between the same parties, may be given in evidence.

On the plea of the general issue, the defendant may avail himself of the defence, that the parties were partners.

APPEAL from the court of the sixth ... the judge of the fifth presiding.

MARTIN, J. delivered the opinion ... court. The plaintiff claims $1000 ... wages as overseer of the defendant ... year 1827, and a part of the crop for ... of three slaves of his, on a special ... the defendants having drove him ... slaves from the plantation without ... cause.

The answer denies every thing ... the plaintiff and his slaves did not come ... plantation till the middle of January ... in that of April.

The plaintiff had a verdict for $...

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[illegible] vs. [illegible]

A plea, that the time when the debt sued on became due, was subsequent to the commencement of the action, is a dilatory exception, and cannot be put in after an answer on the merits.

the court gave judgment *in solido*, with [illegible] from the judicial demand: the defendants appealed.

The evidence shows that the plaintiff was [illegible] missed without cause; he was therefore [illegible] to his wages and the hire of his [illegible] during the period he staid, the cause of dismissal not being any neglect in the discharge of his duties, but gross abuse of one of the defendants, which rendered it insupportable that he should remain.

There are two bills of exception taken by the appellants.

The first is to the reading of the testimony taken down by the clerk at a preceding trial, the witness having been subpœnaed and not attending, being engaged elsewhere, in the discharge of his duties as deputy sheriff. We think the testimony was properly read. See Phillips *on evidence*, *part* 2, 262, where it is said the deposition of a witness will be read, if he fall sick on his way or be abroad.

The other bill is to the opinion of the court refusing leave to the defendants to file an amended answer. This new answer averred that the parties to the suit were partners, and that the negroes of the defendants and some of

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NOBLE vs. MARTIN.

the plaintiff's were working together, a... plaintiff could not maintain a suit, e... the balance that might appear due on... ment, and had no right to sue till it t... Further, that the plaintiff's wages cou... payable, even if dismissed without c... the end of the year, so the suit was pre...

We think the court did not err; th... dants might avail themselves of the i... of the amended answer, on the plea... general issue, and the latter part wa... tory exception which came too late.

On the merits, we think the evidenc... not authorise a verdict to the amoun... and that justice requires that the de... should have the benefit of a new trial.

It is, therefore, ordered, adjudged, a... creed, that the judgment of the distri... be annulled, avoided, and reversed: th... set aside, and the case remanded for... trial; the appellees paying costs in this c...

Thomas & Johnston for the pla... *Winn* for the defendants.

BEATTY vs. WRIGHT'S ESTATE.

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If a creditor's claim depends on a condition precedent, he has no right to interfere with the proceedings of the other creditors in relation to the sale of the estate.

No examination of the merits of a case can take place until issue be joined.

AL from the probate court of the parRapides.

J. delivered the opinion of the

The plaintiff presented a claim against sion of the deceased, in the court of and prayed that the property mortto secure it, might be sold for cash. Prethe decease of the intestate, she had ced an action against him in the diswhich for that portion of her debt which due.

estate being considerably indebted, a g of the creditors was called. At this ng the plaintiff presented her claim, and not appear that any objection was made She required that the property mortshould be sold for cash. The other ors opposed it. On the proceedings be- returned into the court of probates, the homologated them except in relation to demand of the petitioner, which he con- for further consideration.

When the case went into court, the creditpresented a written opposition to the claim the petitioner. They averred that nothing

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BEATTY vs. WRIGHT'S ESTATE.

was due to her. That the investa
the land which formed the considera
notes held by her on a condition pre
be performed by the vendor, before
could be demanded by him, and that
this condition had not yet been compl
They concluded by praying a stay of
ceedings in the court of probates until
pending in the district court was de

The judge would not permit this
to be filed, being of opinion that the
in controversy should be investigated
the petition for the homologation of
ceedings. To this opinion the cre
cepted.

The homologation here alluded to
sume was the final one, when the ta
distribution should be filed. But
the court erred, for if nothing was due
titioner until certain things were perfo
her, then she had not the right to in
the manner the creditors were abou
the property.

Notwithstanding the rejection of th
sition, the court received evidence in s
of the petitioners' claim, and it has be
in this court, that there is sufficient proof

...to act definitively on the case. ...ditors relying on their right to present ...position, which was refused them, ...t have adduced the evidence in their ... and even admitting they had, the ...uld not have given judgment. No is- ...joined and there was nothing to try. ...estatio litis in the language of the ...practice is the foundation of the suit. ...ish law considered it the *ruiz piedra ... y fundamento del juicio*, and that ...nt was valid in which it was omit- ... *Phillip. p.* 1, § 14, *nos.* 1, *&* 4, ... 16, *L* 8. *Code of Prac.* 359.

...been contended that the prayer in the ...for the proceedings to be stayed in the ...f probates, until the suit pending in the ...court, should be decided, was unsup- ...by law. It certainly was so, but the ...did not authorise the court below to re- ...answer. The right of parties to pre- ...ir complaints or defence in a court of ...cannot be tested by the unreasonable- ...their demands. They must be receiv- ...before they can be pronounced on.

...is therefore ordered, adjudged and de-

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EAATTY vs. WRIGHT'S ESTATE.

creed, that the judgment of the court o... bates be annulled, avoided and reve... it is further ordered, adjudged and ... that the case be remanded to the co... bates with direction to the judge no... the opposition of the creditors, to th... the petitioner, and it is further order... the appellee pay the costs of this appe...

Scott for the plaintiff—*Johnston* fo... fendant.

MONTGOMERY vs. RUSSELL.

An antiquidated demand cannot be pleaded in compensation, but may in reconvention.

A party propounding interrogatories, is not guilty of negligence in not procuring testimony to contradict the answers, before the answers are filed in court.

APPEAL from the court of the 6th ... —the judge of said court presiding.

PORTER, J. delivered the opinion ... court. This case is composed of tw... which were consolidated in the distric... In both of them, the plaintiff's claim is ... ed on payments made by him as surety ... defendant in the suite of Alabama.

The defence set up, is nearly the ... each action. The defendant denies ... of the allegations contained in the pe... Charges the plaintiff with having suffered ... ment to be given against him by fraud and ...

n: and pleads various matters in compen- and reconvention.

ne of these suits was instituted in the h of March, 1827—the other in May, of me year. In the first the answer was at the May term. In the second, in the h of June, time having been given in con- ence of the absence of the defendant.

To both the answers a number of interroga- ries were annexed. Several of them were icken out by an order of the court, and the laintiff directed to reply to the rest. His an- ers to them were filed in court on the 15th ober. The cause was tried at the Novem- erm following, and judgment given against defendant, from which he appealed.

When the cause was called for trial, the de- ant made oath, he could disprove several e plaintiff's answers to the interrogato- by witnesses residing in the state of Ala- a: that he had used due diligence to pro- their testimony: and that the application not made for delay, but in order to obtain stantial justice.

The correctness of the opinion of the court low in refusing a continuance on this affida- is presented to us by a bill of exceptions.

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MONTGOMERY *vs.* RUSSELL.

The reasons given by the judge for ruling the defendant to trial, are: *first*, that the plaintiff's demand being liquidated, and that set up in compensation unliquidated, the plaintiff ought not be subjected to any further delay, as the one could not be a good defence to the other. And, *second*, that the commission and interrogatories of the defendant were not taken out of the office of the clerk, until the last days of October.

These objections have been urged at length in this court. They resolve themselves into two grounds: materiality of proof, and diligence in procuring it.

First as to materiality: The court below was correct in its opinion that the matters set up in the answer could not be offered in compensation. But they are pleaded not only in compensation, but in reconvention; and it was not necessary they should be liquidated, to enable the defendant to offer them as a defence in the mode last stated. This doctrine was established in the case of *Agaisse & al.* vs *Guedron & al.* reported in *vol.* 2, 73; and the code of practice has made no change in it, tho' it has decided a question not clearly settled by the jurisprudence existing at the time of its

passage. It is now required, that the demand in reconvention must be connected with the main action. *Code of Practice*, 374 *a* 377.

We have therefore to enquire, whether the matters set up in defence were connected with the principal demand of the plaintiff?

It has been already stated that these actions have grown out of the plaintiff's being compelled to pay bonds which he signed as surety for the defendant. The answer avers the fact of property being placed in the hands of the plaintiff by the defendant, to pay his debts, and that the former has never accounted for it. It is also averred that one of these bonds was paid with money of the defendant, arising from the sale of part of this property.

Now we have no doubt, that if a principal on a bond, places property in the hands of his surety to indemnify him by the sale of it for the obligation he enters into, the latter cannot recover the money he has paid, without returning the objects so placed in his hands, or accounting for them. The demand in reconvention requiring him to do so, cannot be considered otherwise than connected, and that closely too with the action in which the principal is called on for reimbursement and indemnity.

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MONTGOMERY vs. RUSSELL.

On examining the affidavit, we find the defendant swears he can disprove the answers of the plaintiff touching the property delivered to him, to pay the debts for which he had become responsible. Time should have been afforded to procure this proof.

The second ground is the want of diligence. The proof of it is alleged to exist in the neglect of the defendant to take out a commission before the last days of October. But in this we can discover no negligence. The law authorises parties litigant in our courts, to interrogate each other. The answers are taken as true, unless contradicted by two witnesses, or one witness, and strong corroborating circumstances. No duty was imposed on the defendant to get testimony of the fact which he expected to establish by the plaintiff's answer to the interrogatories, until these interrogatories were returned, because under the oath he had made of their materiality, we are bound to believe he considered they would be answered in such a way as would aid him in his defence. The filing of interrogatories is in many instances the exercise of the greatest diligence, the party propounding them can exhibit, for the facts to be proved by them are

frequently established sooner in that way, than they can be in any other.

On the whole we think the defendant laid good legal grounds for a continuance. It was the first term after the case had been at issue. The answers to the interrogatories had not been filed until a short time before the term at which the cause was tried, and the witnesses lived in another state. We cannot enter into the injustice of the course alleged to be pursued by the defendant, nor into the injury the plaintiff may sustain by the delay. Until the *merits* of a case are examined, all the parties to it stand before the court with the presumption of having equal justice and equity' and each have a right to every means of defence which the law affords.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that this case be remanded to the district court, to be proceeded in according to law, the appellee paying the costs of this appeal.

Thomas for the plaintiff—*Oakley & Scott* for the defendant.

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RISON vs. *YOUNG & TURNBULL.*

Any thing may be accepted in payment,

Giving credit on account is evidence of the thing credited being accepted in payment,

APPEAL from the court of the 6th district, the judge of the 5th presiding.

MATHEWS, J. delivered the opinion of the court. This suit is brought by the heirs of Jarret Rison, (whose succession was administered as being vacant) against the sureties of a certain C. K. Blanchard, who appears, (according to the bond on which the plaintiff relies for a recovery,) to have been appointed curator to the vacant succession on the 27th of November 1816. The court below gave judgment in favour of the plaintiff, for $1,376, 90 cents, from which the defendants appealed.

The evidence of the case shews: that Blanchard gave his bond as curator of J. Rison's estate, with J. Dill, the ancestor of Mrs. Young, and W. Turnbull sureties, that he should faithfully perform the duties required of him by law, in his administration of the succession committed to his charge as curator aforesaid, and that in his capacity as such, he received from the parish judge a large amount of notes and other orders of debts due to the estate of the intestate, to be by him collected for the benefit thereof. No account appears to have

been rendered by him to the judge of probates, as required by law, but several of the claims which he had to collect, seem to be satisfactorily accounted for by the documents received in evidence in this suit which were offered on the part of the defendants: the judgment of the district court being only for the balance of the whole amount of claims placed in the hands of the curator for collection as above stated, after deducting the sums thus accounted for.

The appellants deny that they are in any manner responsible to the appellee, because the curator was guilty of no neglect of duty or *malfeasance* in office, during the period for which they bound themselves to answer for his faithful administration. Should it however be considered that they are responsible for the conduct of Blanchard, as curator, this responsibility ceased on the appointment of a new curator to the estate of Ryson, which took place in the person of the said Blanchard on the 5th of March, 1818, and that up to that period, from the time he received the claims of the successor to collect, no part thereof could have been legally collected.

From this statement of the case, it is evi-

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dent that the legal obligations of the defendants must be tested by the provisions of the old civil code, on the subject of vacant estates.

They are to be administered by curators appointed for that purpose, who are bound to give security for the faithful discharge of their duty, and the restitution of all sums which they may receive during their administration. *See old code, p.* 176, *art.* 134. They were also bound to render an account to the parish judge by whom they were appointed, of their administration at the expiration of one year and one day, from the appointment, which term might be extended three months longer; *See same art. p.* 180, *art.* 144. Their functions ceased on the rendition of such account. *See preceding art. same page.*

We have already stated, that Blanchard received his first appointment on the 27th of November 1816. On the 2d of May and 9th of November of the year 1817, (as appears by his receipt of those dates) he received the notes, bonds &c. to collect for the benefit of the succession which he then administered. The greater part of the sums which the curator was bound to collect, did not become due

until the 1st of March 1818, and 1819; long after the expiration of the time of office fixed by law for the duration of the administration of vacant successions by curators. On the 5th of March 1818, it appears by the evidence of a bond which was held by this court, to be incomplete, and not binding on the sureties, (in the case of Wills vs. Dill, reported in 1, *N. S.* p. 592,) that Blanchard was re-appointed curator of Rison's succession. It is objected that this instrument being imperfect, and without force against the sureties therein named, affords no proof of the re-appointment. The only evidence which appears on the record of the first appointment of Blanchard, is the bond on which the plaintiff relies. The last bond although incomplete, we are of opinion, proves the re-appointment as effectually as the first did that which took place in 1816, for both must have preceded the execution of the bonds.

The whole amount of debts which the curator had to collect according to his receipt of the 2d of May 1817, did not become due until the 1st of March 1818. His power to enforce payment as curator had ceased by limitation of law, on the 29th of November, of he year preceding. A violent presumption

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therefore arises that he did not collect any part of the debts thus intrusted to him. It is true perhaps that he ought to have returned the evidences of them to the parish judge from whom they had been received, and to have rendered an account of his administration within the time prescribed by law. In that event they would have been handed over to a new curator: but he obtained this office for himself and consequently held them under the new appointment and under that alone would have been responsible to J. Rison's heirs for any amount collected; or the return of the evidences whic she wed the debts due to the succession of the intestate. The curator was by law bound to render an account of his administration at the expiration of his first term of office; but it appears to us that his neglect in this respect, has not produced any injury to the plaintiff resulting from his management of the vacant succession, considered in reference to the sums which he ought to have collected in pursuance of his receipt of the 2d of May 1817, because under his first appointment he had not time to inforce their payment. The sureties to the bond may well have imagined that they were entering into

responsibility only for the acts which the curator had legal power to do during the period of one year and one day—within that period it is impossible that he could have inforced the payment of the debts specified in his first receipt to the parish judge, and as to them his sureties ought not to be held liable.

The amount of claims expressed in the receipt of November 1817, must be presumed to have been due when the curator received them for collection, and as he has not accounted for them, the sureties are answerable to the plaintiff for the amount of those claims.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be avoided, reversed and annulled; and it is further ordered, adjudged and decreed, that the plaintiff and appellee do recover from the appellants and defendants, (*in solido*) the sum of six hundred and thirty two dollars, and eighty-one cents, (632 81) and that the appellee pay the costs of this appeal, those of the court below to be borne by the appellants.

Thomas & Winn for the plaintiff—*Oakley, Scott & Wilson* for the defendant.

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{ If the plaintiff relies on a special agreement, he cannot give evidence of the value of the services.

APPEAL from the court of the sixth district —the judge of the 5th district presiding.

MARTIN, J. delivered the opinion of the court. The plaintiff claims wages as an overseer, and part of the crop for the labour of two of his slaves, on a special contract made with the defendant's agent.

The answer, after the general issue, denied the agency of the person who made the contract, and averred the plaintiff had received large sums for which he was accountable, and judgment was prayed in reconvention.

The plaintiff had judgment for $575.

The defendant appealed.

Our attention is drawn by the appellant to a bill of exceptions taken by his counsel below to the opinion of the court, refusing him leave to examine a witness as to the value of the plaintiff's services. Leave was refused on the ground of the plaintiff's having declared on a special agreement, which precluded the necessity, and rendered it useless to enquire into the value of the services.

We think the district court did not err.

On the merits we are of opinion that the

question of fact was correctly pronounced on by the district judge.

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It is, therefore, ordered, adjudged, and decreed, that the judgment of the district court be affirmed with costs.

Thomas for the plaintiff—*Boyce* for the defendant.

COX vs. *WILLIAMS.*

Sureties of a curator are not responsible for debts of the estate which the curator could not enforce payment of.

APPEAL from the court of the 6th district, the judge of the 5th district presiding.

MATHEWS, J. delivered the following opinion. This suit is brought by the endorser of a negotiable note for the sum of 1950 dollars, which was made payable to Isaac Baldwin. The defendant in his answer pleaded want of consideration or rather failure of the consideration, in consequence of which he made the promise to the payer of the note; and that it is subject to all objections in the hands of the plaintiff, to which it would have been liable in those of the original holder and payee.

The court below gave judgment in favor of the defendant, from which the plaintiff appealed.

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This case was formerly before the appellate court; and was remanded on a bill of exceptions taken to the introduction of Baldwin as a witness, to prove that Cox, the present plaintiff, altho' he appears in the shape of an endorser, was the real payee of the note in question, which was obtained through the agency of the witness. This fact is now fully established by the testimony of Baldwin, and the case must be examined as if pending between the original parties to the instrument.

In proceeding thus to investigate it, a concise history of the transactions which led to the execution of the note becomes necessary.

The appellant had a claim agaiant one L. H. Gardner, which he placed in the hands of Baldwin, as attorney, to collect. This claim was in the hands of the agent at the time of the death of Gardner. The estate of the latter was sold at probate sale, and the widow of the intestate became the purchaser of a family of negroes, which made a part of the succession, for the price of 2450 dollars, and to secure payment, the present defendant bound himself as her surety. Afterwards he was dissatisfied with the conduct of Mrs. Gardner, in relation to the management of her pecuniary concerns,

and took the negroes which she had bought under a sale from the court of probates at the same price she was to have given for them, and gave his own note to Cox, the creditor of L. H. Gardner's estate, for that amount. On the receipt of this note, Baldwin, the agent of Cox, credited the estate of Gardner with the amount thereof, in an account which he filed in the office of the parish judge of Rapides. Subsequent to these proceedings, Jackson & Reynolds inforced a judicial mortgage which they had on the property of L. H. Gardner to the amount of 1300 dollars, and subjected the negroes in the possession of Williams to its payment. The record of a suit heretofore decided by this court, is made evidence in the present action. In the former case, Baldwin sued for the use of Cox on a note similarly situated with that now under consideration. The answers of the nominal plaintiff in that suit, proved a discharge given to the estate of Gardner, Cox's original debtor. His testimony in the present case proves the same fact, but it is here accompanied by a statement of an account between the witness, as agent for the appellant, and the succession of Gardner, wherein the latter is credited (amongst other

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matters) with the amount of the notes given by the appellee and made payable to the agent of Cox, the original creditor. This additional evidence, (which the witness now says is the only acquittance he ever gave in favor of Gardner's estate); it is contended on the part of the appellee, disproves his answers to the interrogatories in the former suit; upon the evidence of which this court then held that the acceptance of Williams' notes and discharge of the original debtor operated a novation.

We are however of opinion, that the introduction of this document, has no tendency to distinguish the present from the former case. It was made out before witnesses and deposited in the office of the judge of probates, as evidence of payment, or a release of the obligation, to the succession of the deceased, in consideration of having accepted a new debtor in pursuance of the true spirit and meaning of our laws on the subject of delegation. In the case of *Barron* vs. *How*, reported in *vol.* 2, *p.* 144, this court held that an acknowledgment of a receipt of the promissory notes, of the person delegated, as payment, produced novation. This was nothing more

than a credit given by the creditor to the original debtor in discharge of his obligation, in nature of a payment by delegation. A receipt is evidence of payment, but payment may be established by other evidence; and whenever such evidence shows that any thing has been accepted as payment, the debt is extinguished, whether it be by a transfer of obligations on other persons, a payment in money, or a *dation en paiement*.—Proof which shows that credit has been given on account with the original debtor in consideration of a delegation made by him to his creditor, is evidence that the latter accepted the debt thus delegated in payment; and on failure of the person delegated to pay, he would not be permitted to annul the credit thereby given to his original debtor, and pursue the latter on his original obligation. A debt once extinguished by novation cannot be again revived, unless by the consent of both parties to the original contract. From this view of the case it may be easily perceived, that we are of opinion that the production of the document in question does not weaken the evidence procured from Baldwin on interrogatories in the former case, nor does it in any manner invali-

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date his testimony in the present; wherein he explicitly declares that his intention was to discharge the estate of Gardner from all liability to Cox, his constituent, and to receive the appellee as substituted in the place of that estate.

Martin, J. I assent to the opinion just pronounced; but as there is a difference of opinion amongst the members of the court, in regard to a part of it, the law requires I should express mine.

I think that there cannot be better evidence of the partial or entire payment of a debt, than the express acknowledgment of the creditor, evidenced by his giving credit to his debtor.

If a planter send to his commission merchant a quantity of cotton to sell and a draft to receive, in order to discharge what he owes him for supplies to his farm, the merchant does not credit him with the proceeds of the cotton or draft, till they be actually received, or he means to take the cotton or draft on his own account. I think this is the universal practice. Till the cotton be sold and the amount received or the draft paid, the planter is not a creditor of the merchant, and nothing makes him so but the money coming to

the hands of the latter, by the sale of the cotton or the payment of the draft, and there cannot be a better evidence of this circumstance than credit given on the books of the merchant in the account of the planter.

In the case of *Levy* vs. *the bank U. States*, 1 *Dallas*, 234, the supreme court of Pennsylvania held that credit given by the bank in the plaintiff's books, precluded the bank from saying that the check, the amount of which was credited, was a forged one, and that therefore the credit ought to be stricken out. When banks or merchants receive a draft or property on account of a customer, the amount is never carried out to the outer column, but inserted in an inner one. I consider credit given in the ledger as express evidence of a payment as a receipt in full. On an account current, nothing but the balance is due, and the maker is bound by every item with which he has credited his customer, unless errors be proved.

This case differs from that of *Gordon & al.* vs. *Macarty*. There a receipt was given for a note; here *credit* is given for the amount. The receipt was evidence of a liability to account: the *credit* of a payment.

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PORTER, J. I agree in the conclusion to which the majority of the court have arrived. The agent swears positively that the notes of the defendant were received from Mrs. Gardner, in full discharge of the claims held by him, against her, and her husband's estate. The receipt on account now produced, which it appears was the only written instrument that passed between them, does not by any means contradict this statement. It on the contrary supports it.

But I cannot assent to the proposition contained in the opinion just delivered by the presiding judge of the court, "that proof which shews that credit has been given, on an account with the original debtor in consideration of a delegation made by him to his creditors, is evidence that the latter accepted the debt thus delegated *in payment*." Our code requires that the discharge should be *express*. It is true, it is immaterial in what words that discharge is given, so that it is clearly *expressed*. But in my mind the mere act of giving credit on account, for the debt of another, remitted by the debtor, does not necessarily create an extinction of the original obligation, if the creditor retains that first given to him,

and does not give up the one, when he receives the other. A strong presumption is, it is true, created of the fact, but that is not sufficient. *If the act of the creditor can be explained in any other way but that of discharging the debtor*, the provisions of our code prohibit such a construction being put on his act. Merchants, I believe, are in the habit of entering credits on their books of all notes or bills remitted to them, and their usual course is to charge those bills and notes again to the correspondent if at maturity they should be unpaid. In the case of *Gordon, Grant & Co.* vs. *M'Carty*, we held, that when the creditor gave a receipt in which he acknowledged he had received another note on account, that such acknowledgment did not produce novation. That was as strong a case as this; as that which he received on account, it is presumed he credited on his books.

It is, therefore, ordered, adjudged, and decreed, that the judgment of the district court be avoided, reversed and annulled; and it is further ordered, adjudged and decreed, that the plaintiff and appellant do recover from the

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defendant and appellee the sum of nineteen hundred and fifty dollars, (1950,) with interest thereon at the rate of ten per cent per annum, from the first day of April 1821, until paid, with costs in both courts.

Boyce for plaintiff—*Thomas, Scott and Winn* for the defendant.

WEATHERSBY vs. *LATHAM*.

If the jury find contrary to the weight of evidence, the case will be remanded

APPEAL from the court of the 6th district—the judge of the 5th presiding.

MARTIN, J. delivered the opinion of the court. This is an action of rescission, brought on the sale of a slave, alleged to have died in consequence of an incurable disease, under which she laboured, at the time of the sale, to the knowledge of the vendor.

The general issue was pleaded.

The plaintiff had a verdict for $425, and judgment for the same with interest at six per cent, from the day preceding that on which the verdict was rendered, and costs.

The defendant made an unsuccessful attempt to obtain a new trial on the ground of the verdict being contrary to law and evidence

and not having done justice to the parties, and appealed.

On a close examination of the evidence, we are of opinion that the verdict is not supported by it.

It is, therefore, ordered, adjudged, and decreed, that the judgment be annulled, avoided and set aside, and the case remanded for a new trial, the appellee paying costs in this court.

Flint for the plaintiff—*Johnston* for the defendant.

WALSH vs. *M'NUTT'S SYNDIC.*

Under the old code, the heirs in partition had a tacit mortgage, for the execution of all the engagements therein contained.

APPEAL from the probate court of the parish of Rapides.

PORTER, J. delivered the opinion of the court. The plaintiff demanded in the court of probates that she should be placed on the tableau of distribution as a mortgage creditor. The judge refused the demand, and she appealed.

The deceased was married to one of the heirs of Walsh, and the note was given on

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the settlement and partition of the estate, for the balance due the plaintiff.

Our new code requires a special mortgage in cases like this, but by the provision of the old, in force at the time this note was given, it is expressly provided that the heirs in partition have a tacit mortgage for the execution of all the engagements therein contained, and flowing therefrom. Among these engagements is specified, the case before the court, namely "the return of the money which some lot might be burthened with."—*Civil Code* 200, *art.* 246.

It is therefore ordered, adjudged and decreed, that the judgment of the probate court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that this case be remanded to said court, with directions to the judge to place the appellant on the tableau of distribution as a mortgage creditor. And it is further ordered that the appellee pay the costs of this appeal.

Thomas for the plaintiff—*Boyce* for the defendant.

OAKLEY & AL. vs. PHILIPS & AL.

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A cause is remanded, to ascertain the right of appeal claimed by a third party. The court cannot go into any other question.

APPEAL from the court of probates of the parish of Rapides.

MARTIN, J. delivered the opinion of the court. In this case objection having been made to the right of Oakley & al. to appeal in a suit to which they were not parties, they insisted on their right of doing so on the ground of their interest in the matter in dispute. This interest was denied, and we directed a mandate to the court of probates to ascertain whether the appellants had really the interest on which they grounded their right of appeal.

After examining the evidence produced by the parties, the court of probates determined the appellants had such an interest as authorized them to appeal.

The court, afterwards yielding to the request of the parties, examined witnesses and received other evidence, to ascertain whether Richard L. Philips, one of the appellees, be the son of Isaac Philips, deceased. The court found that he was.

From the judgment of the court of probates Oakley & al. appealed.

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Our mandate required the court of probates to ascertain whether Oakley & al. had an interest in the matter in dispute. From its decision that they had, the adverse party did not appeal.

Of the effect of the finding of the judge on the question afterwards submitted to him, we have now nothing to do; it suffices that the question submitted was acted on, and accordingly the appellees must answer to the petition of appeal of Oakley & al.

The appeal from the judgment of the court of probates on the question submitted to it by the court, being by the party in whose favour the judgment is, must be dismissed with costs.

Oakley & Thomas for the plaintiffs—*Boyce* for the defendants.

MAES vs. *GILLARD'S HEIRS & AL.*

Indian tribes were entitled by settlement under the Spanish government to the quantity of land contained in a square league.

APPEAL from the court of the 6th district, the judge of the 5th district presiding.

PORTER, J. delivered the opinion of the court. This is a suit in jactitation, or slander of title. The plaintiff avers himself to be the owner of a large portion of land on Red river in the possession and right of which he is dis-

Testimony taken under the act for perpetuating it, if it be reduced to writing by the attorney of the party applying for it, will be rejected.

Those who hold without title, cannot plead less than thirty years actual possession.

turbed by the defendants publicly asserting that he has no title to the premises, but that they are the owners thereof.

To this petition the defendants have answered by denying the plaintiff's title, and setting up one in themselves.

The principles of law which govern suits of this kind were gone into so fully in the case of *Livingston* vs. *Hermann*, that it is deemed unnecessary to notice them particularly in the present instance. The defendants might if they had chosen, have admitted the assertions of which they were accused, and averred their readiness to bring suit. But as they have thought proper to set up their title, the dignity and relative strength of their claims can be passed on and finally decided in this action.—9 *Martin*, 656.

The plaintiff claims in his petition forty arpents in front on each side of the river, and immediately below these lands a tract of 640 acres, also lying on each side of the river.

The upper part of these 40 arpents is demanded in virtue of an order of survey from the Baron de Carondelet, of date the 14th May 1794, in favor of one Dorotea, a free woman of colour, which ripened into a complete

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grant the 25th November, 1796. The grantee sold to the petitioner on the 7th April, 1796 The next ten arpents front in descending, in virtue of an order of survey in favour of the petitioner, of date the 15th March, 1797.

And the remainder, twenty arpents, under an order of survey of date the 18th May, 1796, in favour of one Francois Boissier, who sold to the plaintiff all the land embraced by his title on the 1st September, 1804.

The six hundred and forty acres which form the inferior portion of the petitioner's claims, was what is called a settlement right confirmed in favour of Felix Trudeau on the 5th October, 1818.

The complete grant to Dorothea, *f. w. c.* and the other orders of survey in favour of the petitioner and Boissier, have been confirmed by the board of commissioners of the U. States for the western district.

The defendants claim the land covered by these titles or a great portion of it, in virtue of a purchase from the Pascagoula Indians by Colin La Cour on the 9th April, 1795, and an order of survey in favour of Joseph De Blanc of date the 6th May, 1795, calling to bound on the lands of La Cour below, and above by the domain of his majesty.

The court of the first instance gave judgment in favour of the petitioner for all the land claimed by him, and expressed their opinion that the title of the defendants under the Indians, together with that claimed by them under the purchase from De Blanc, did not in fixing the lower boundary at the bayou St. Philip, embrace the premises covered by the plaintiff's titles. From that judgment the defendants appealed.

The titles of the plaintiff are such as give a good right to the land covered by them, and they appear to be properly located. The main questions in the cause, therefore, depend on the title set up by the defendants, under a purchase from the Pascagoula nation of Indians.

The plaintiff has assailed it on three grounds.

1. That the Indians had no right in the soil.

2. That they never sold.

3. That the quantity sold by them is not of sufficient extent to embrace the lands claimed by him.

I. The first cannot be considered an open question in this court. And to those who are desirous of knowing whether all the highest Spanish authorities in Louisiana, for the space of thirty four years, were ignorant of their own

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laws, and violated them in sanctioning sales of land by the indians; and whether this court has in various instances, misunderstood the laws of the Recopilacion, we refer them to *the 24th chapter of the 20th book of Sobera-no's politica Indiana.* Where the right of the Indians to sell, and the fact of their not losing their right in one *pueblo*, or *reduccion*, by being moved to another, is, in our opinion, clearly recognized.

II. The second question is, did they sell to those under whom the defendants claim?

The first proof offered in support of the purchase is contained in a certificate of the commandant of Natchitoches, dated the 9th April 1795, in which he states "that in virtue of the power which had been conferred on him by Mr. Colin La Cour of Pointe Coupée, of having bought the establishment and cultivable lands of the village of the Pascagoula Indians, bounded by the bayou L'Ecor, where the chief was established, and below by another bayou situated on the left bank in descending, which said sale and cession thus made by the said nation, of their proper will, and entire movement, for the price of two hundred and fifty dollars, which I have paid them in cash

in the presence of Edward Murphy, Louis Lambre, Antoine Plauché, and Jean Varangue interpreter, besides the crews of two boats. In faith of which I deliver the present to serve as a title to Mr. La Cour, that he may apply to the governor general for a title in form." This instrunent is signed by the writer and two witnesses. At the bottom of it is the following: V.B. El Baron de Carondelet.

This court is fully aware of the loose manner in which business was transacted, and acts passed, under the former government of this country, and we have felt every desire to disregard the forms of the instruments of those times, and give them effect, according to the intention of the parties. But there must be some limit to this favourable view, and we think this case presents one. The act is not only devoid of form, but it essentially wants substance. The parties who are said to have sold their land never signed or put their marks to it. It does not appear they were present when it was drawn up. Or if they were, that it was read over to them, and that they assented to its contents. It is not an authentic act. It is not under oath, and it is *ex parte*. It comes too from the agent of the vendee, a

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circumstance well calculated to weaken any confidence in it.

It may perhaps strengthen the other evidence in the cause, so far as it corroborates that evidence, but as to those facts of which there is no other proof it is not entitled to the least consideration.

The proof given on the trial in support of the sale is as follows:

The evidence shews that the Indians moved off from their settlement on Red River about the time mentioned in the commandant's certificate. *St. André* says he has heard of La Cour's purchase from the Indians. *Ganché* states in his evidence, that the chief who *sold* the land to La Cour, lived at Gaillard's place. Hait believes that La Cour bought the whole of the Indian land—Hoffman swears also, that he believes it.

In addition to this parol evidence given in court, the testimony of witnesses taken before the board of commissioners, was read on the trial without objection. Three of these witnesses positively swear to a sale, one of them states he was the agent for Indian affairs; that he was the interpreter when the bargain was made between La Cour and the Indians. Two

others swear that they had much conversation with many of the Indians at the period of their removal to bayou Bœuf, and that they said they had sold their lands on Red river to La Cour.

In the case of *Sanchez* vs. *Gonzales*, this court decided that under the former government of Louisiana, a verbal sale of immoveables was valid: the evidence in this case coupled with the uninterrupted possession of the vendee and his successors for nearly thirty years previous to the commencement of this suit, satisfies us that La Cour did purchase as the defendants allege. 4 *Martin.*

III. The next point in the cause is, how much land did the Indians sell?

As the certificate of the vendees' agent does not, in our opinion, establish any fact, and as the testimony of Varangue, taken under the law for perpetuating evidence, must be rejected as written by the attorney of the party whose interest it was to preserve it, we lay out of view the boundary of the *bayou des Ecors*, the proper location of which was the subject of so much testimony in the court below. The parol evidence which establishes the sale gives no boundary. It merely proves

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the Indians sold their land on Red River.—All the evidence goes to shew that their principal village was at the place where the defendants now live.—10 *Martin.*

The quantity of land to which tribes of Indians were entitled under the Spanish government, has been contested in this instance, as it has been in every case of this description that has come before the court. One party urges that it was a league round of the village in every direction. The other contends it was but a league square.

In the case of *Reboul* vs. *Nero*, this tribunal declared that Indians were entitled by law to a league in extent round their village; whether that opinion was required for the decision of the case, does not clearly appear from the report of it. In the case of *Martin* vs. *Johnston*, the court referring to that decision, said it was unnecessary to determine the question, for allowing the Indians much less, the titles of those who claimed under them in that action, would embrace the property in dispute. In *Spencer's heirs* vs. *Grimball*, the case was decided on the confirmation by congress, and an opinion on this point expressly waved.—5 *Martin*, 490, 655, 6, 355.

The only law we can find which defines the extent of Indian settlements, and the quantity of land to which they have a right in virtue of them, is found in the 6th book of the Recopilacion, and is the 8th law of the 3d title of that book.

The translation of it, as given in the case of *Martin* vs. *Johnston*, is substantially correct. It is in these words: "The seats on which the villages of Indians shall be placed, shall be such, as are all well provided with water, arable land, and woods, and to which there may be easy access, and they shall have a common of one league in extent, where their cattle may graze without being mixed with those of the Spaniards."

These expressions of a "a common of one league in extent," are given in Spanish by the following: *un exido de una legua de largo*, and tho' the true meaning is not quite free from doubt, it does not appear to us, that they support the construction of a league in extent, round the village in every direction. Nothing of there being a league *round the village*, is said in the law. The common is to be of a league in extent. And by giving a league in every direction, there would be a common of

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two leagues in extent at every point of the compass.

This construction is somewhat opposed to the reasons given in the law for granting land to the Indians. The avowed object is, to prevent their flocks mixing with those of the Spaniards. And that object would certainly be better attained by granting them a league in every direction from their village. But other provisions of the laws of Indians deprive this argument of a great deal, if not all of its force. By them Spaniards are prohibited from placing their flocks of large animals (*ganado mayor*) within a league and a half of the ancient Indian settlements, and their flocks of smaller animals (*ganado menor*) within half a league. In regard to the new settlements, the prohibition extends to double this distance. These restrictions rendered it unnecessary to give the Indians the extent of a league in every direction round their villages for their cattle. The appellants have, however, relied on these laws, to shew that the Indians were entitled to all the lands on which the Spaniards could not pasture their flocks. But nothing in our judgment can be more unfounded than this pretension, for it would make the quantity of

and which it is supposed was given to the Indians when they were settled by the government, depend on the kind of cattle, the white men approached them with. If it was a *ganado mayor*, they had a league and a half in extent around them; but if a *ganado menor* was brought near them, their right diminished to half a league from their village. These laws were evidently political regulations, for the better preserving harmony among the different races of men who formed the population of these colonies, and for the protection of that race, on which they had inflicted so much injury, when they first discovered and settled the country.—*Recopilacion de las Indias.* lic. 4, *tit.* 12, *law* 12, *ibid liv.* 6. *tit.* 3, *law* 20.

The government of the United States have so understood these laws in limiting their confirmation of the title to the quantity contained within a league square; and admitting with one of the counsel for the appellants, that by an ordinance passed in 1754, viceroys and governors were not limited to the quantity of a league, if a larger portion of soil was necessary for the use of the Indians, there is no evidence before us of the numbers of this tribe which would authorise us to conclude that a

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greater quantity of land, than that embraced by a league square was necessary for them. The grant of the governor does not establish it, for it places them on the hills near the bayou Rigolet de bon Dieu, in descending. If they afterwards scattered along the bank of the river so as to cover a much larger space of ground, and for their own convenience fixed their lower boundary out of the league; nothing in the evidence induces us to believe that the Spanish authorities ever consented to this extension of the limit below, on any other consideration, than that it should be proportionably contracted above.

The next question is, how should this league be located? The appellants seemed to concede on the argument, that if their claim was reduced to the quantity of a league square, they preferred taking it from their lower boundary. This conclusion is that to which this court would have come, because the lower boundary is established beyond all contradiction, and the upper is doubtful.

The appellee assuming it to be a fact, that the lower bluff where the heirs of Gillard are settled, had been the upper boundary by which the Indians sold; insists that the claim of the

appellants must be limited to that place, and that if in running down to the Bayou St. Philip, a sufficient quantity is not found to give them the number of acres contained within a league square by laying off the land on the river, with the ordinary depth of forty, that the side lines must be extended, so as to embrace the whole superficies covered by the title, and that the upper limit could not be extended beyond the boundary given by the sale.

Under the view we have already given of the evidence, it is not proved that the *Bayou Des Ecors*, was the boundary above. It is only spoken of in the commandant's certificate and Varang's testimony.—The last has been excluded, and the first does not prove the fact.

The course and direction of the side lines next require consideration. All the witnesses prove that the Bayou St. Philip or Bayou La Bourne, was the dividing line between the Pascagoulas, and Apalachia tribes of Indians; as this was a natural boundary we think it must form the lower limit on one side of the river, and that the line of the upper boundary on the same side should be extended to correspond with the general course of the Bayou. We are also of opinion that the direction of the

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side lines on the opposite side of the river must be conformable to these. This is the mode in which the commissioners of the United States contemplated the land should be located.

Giving therefore to the defendants the quantity contained within a square league, and laying it off conformable to the universal usage prevailing at the time the lands were settled by the Indians, by so many arpents in front, with the depth of forty on each side of the river, as will embrace the quantity called for by the title; we have next to decide on the conflict produced by the upper tract of the defendants lying immediately above and adjoining the Indian title, which they derive from a conveyance by De Blanc, the grantee; and the lower tract of the plaintiff which he acquired from Trudeau. We think the defendants is a superior title and must prevail. It is an order of survey, dated in 1795. That opposed to it, is a settlement right, confirmed in 1818.

As to the plea of prescription, the defendants had no title beyond the quantity contained in a league square, they therefore required thirty years actual possession to enable them to hold under this title, and that is not shewn here.

It is therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided & reversed, and it is further ordered, adjudged and decreed, that the defendants be quieted in their title and possession to the quantity of land contained within a league square, according to the following notes and bounds: Beginning at the mouth of the Bayou La Bourne at the point marked *F*. on the plat of survey filed in this cause—thence along a line drawn at right angles, from the general course of said bayou for forty arpents back from the river, such a distance as by measuring forty arpents on each side of said line, will contain the superficies embraced by a square league. The said lines on the opposite side of the river from the Bayou La Bourne on the lower boundary; and the side lines on both sides of the river on the upper boundary, to be in conformity with the general course of said bayou from its mouth to the distance of forty arpents back.

And it is further ordered, adjudged and decreed, that the defendants be quieted in their title and possession, to a tract of land of twenty arpents front with the ordinary depth, lying above and adjoining the square league acqui-

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red from the Indians, the side lines having the same course and direction as those of said league; and that the plaintiff be perpetually enjoined from asserting any title to the same by virtue of any title acquired by him previous to this time; and it is further ordered, adjudged and decreed that he pay costs in both courts.